Corp., 656 F.2d 120 (5th Cir.1981). Defendant claims plaintiff cannot satisfy the latter two requirements because the undisputed evidence before the MSPB revealed that he was not qualified for any of the seven positions open in OPR, and because it is undisputed that, of the four individuals that plaintiff claims were preferentially transferred out of EPD prior to the RIF, two were over 40 and two were under 40, thus demonstrating the absence of age discrimination.

[6] Defendant's contentions are flawed, however, in at least two respects. First, whatever the undisputed evidence before the MSPB, that evidence has not been put before this court. Rather, defense counsel has simply attached the opinions of the MSPB to the motion for summary judgment, as well as his own unsworn declaration, pursuant to 28 U.S.C. § 1746, that the recitation and account of testimony given by witnesses before the MSPB set out in defendant's motion and reply brief is, to the best of counsel's knowledge, accurate and correct. This court's review of plaintiff's claim before the MSPB, however, is *de novo*. *Nabors v. United States*, 568 F.2d 657 (9th Cir.1978). While the court may consider the administrative record when relevant, a grant of summary judgment based on the factual findings of the MSPB presiding official and the factual representations of defense counsel would effectively deny plaintiff his right to a *de novo* hearing. Second and more importantly, the essence of plaintiff's ADEA claim is not that the RIF was carried out in a discriminatory fashion, but that the events prior to the RIF were improper. For this reason plaintiff's claim cannot be neatly analyzed according to the framework set out in *Williams v. General Motors Corp.*; whether or not plaintiff was qualified for any of the seven vacancies in OPR after the RIF is essentially immaterial to his claim that Warren Bullock transferred him to EPD with the knowledge that that division's days were numbered, and with the intent and purpose of getting rid of him. It is true that plaintiff has offered little evidence other than his own belief in support of this claim, but defendant's representations concerning undisputed testimony before the MSPB do not negate that claim, or so impugn it that this court must enter summary judgment in favor of defendant.[4]

Accordingly, for all the foregoing reasons, it is this 1st day of July, 1987

ORDERED that defendant's motion to dismiss count I of the complaint be and it hereby is denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment as to count II of the complaint be and it hereby is granted.

4. Defendant's representations would, if accepted, negate plaintiff's claims concerning the preferential pre-RIF transfer of certain employees out of EPD. His allegations concerning his own transfer *to* EPD would nevertheless continue to remain viable, however. Because the court must go to trial on this latter claim, and because plaintiff is entitled to *de novo* review on his ADEA claims in general, the court declines to grant defendant summary judgment on the propriety of the transfer of certain EPD employees just prior to the RIF.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al., Defendants.

Civ. A. No. 82-0192.

United States District Court, District of Columbia.

Sept. 10, 1987.

Motions were filed seeking removal from antitrust consent decree of line of business restrictions imposed on regional telephone companies. The District Court, Harold H. Greene, J., held that: (1) under the decree, restrictions could be removed only on affirmative showing that regional

the beneficial effect of permitting the Regional Companies hereafter to make decisions with respect to substantial segments of their business without day-to-day involvement or supervision by the Court.[336]

Second. One of the core restrictions of the decree prohibits the Regional Companies from providing information services. The Court is retaining that restriction insofar as it involves the generation of information content, for the same reason that it is retaining the other core restrictions. If the Regional Companies had the authority to sell information in competition with other providers of these services, their control of the networks essential to the distribution of that information would give them the same ability to discriminate against competitors as they have with regard to interexchange services and the manufacture of telecommunications equipment.[337]

That does not mean, however, that the public must be deprived of the revolutionary changes that are possible if information, instead of being transmitted only by current methods,[338] can also be made available to vast numbers of consumers instantaneously by means of the telephone network. Other nations—France in particular, but also Japan and Great Britain—have experimented with such an innovative use of the telephone system, with some considerable success. The French Teletel system —which may for present purposes serve as a rough guide in this regard—has some three million subscribers and is used to supply to these subscribers immediate access to about 4,000 independent services supplying specific information upon request in such fields as banking and brokerage, shopping (availability and price), travel (schedules and reservations), tickets to entertainment and sporting events, employment availability, language instruction, governmental notices, schedule of meetings of associations, reprints of newpaper and magazine articles, and others.

The Court has concluded that the apparently competing interests—prevention of monopolization of information services versus broad availability of such services to the public—can be reconciled by severing for decree purposes the generation of information content (which will remain prohibited to the Regional Companies) from the transmission of information services (which the Regional Companies will be allowed to provide).[339]

The Court will accordingly lift so much of the information services restriction as prevents the Regional Companies from constructing and operating a sophisticated network infrastructure[340] that will make possible the transmission, on a massive scale, of information services originated by others, directly to the ultimate consumers.[341] No one can know with certainty whether this revolutionary means of transmitting useful, readily-available information will find acceptance in this country to the same extent as it has elsewhere. But the Court believes that it should do what it legitimately can to foster the availability of such a service.

The decisions made herein continue to advance the objectives of the decree as the Court understood them when it approved that decree in 1982, and in its rulings since then: (1) the establishment in the telecommunications industry of conditions of fair competition, freed from of the heavy hand of monopoly; (2) the protection of the goals of universal service and of reasonable rates for those who could not otherwise afford telephone service; and (3) the encouragement of innovation, to the end that the full

336. Part IX, *supra*.

337. Part V, *supra*.

338. *E.g.*, by contacting a public library, through the mails, or by advance subscription to one of the existing information services.

339. *See* Part VII, *supra*.

340. Part VIII, *supra*.

341. In order to receive this information in usable form, these consumers will not require, as now, a complex PBX to unscramble and receive it, or even a full-fledged computer terminal; they will only need to have what is called a "dumb terminal"—a relatively inexpensive instrument that could be sold both by the Regional Companies and by more conventional retailers.

9. Monopolies ⇐24(15)

Record in proceeding on motions to remove line of business restrictions on regional telephone companies, contained in antitrust consent decree, did not warrant removing restriction prohibiting regional telephone companies from manufacturing or providing telecommunications products or manufacturing consumer premises equipment.

10. Monopolies ⇐12(1.3)

Under antitrust law, serious competitive concerns are raised even when relatively small market shares, for example as low as seven or eight percent, would be foreclosed as a result of leveraging of regulated monopolies into a related but unregulated market.

11. Monopolies ⇐24(15)

Record, in proceeding on motions to remove line of business restrictions imposed on regional telephone companies under antitrust consent decree, did not warrant removing prohibition on the companies' providing "information services," despite contention, inter alia, that government regulations would suffice to curb discrimination against putative competitors, but so much of the restriction would be lifted as would enable the regional companies to acquire and operate the infrastructure necessary for transmission of "videotex" information services generated by others, without authority to market content-based information services, and in connection therewith, companies could offer "White Pages" but not "Yellow Pages" directory services in electronic form. Communications Act of 1934, § 204(a), 47 U.S.C.A. § 204(a).

12. Monopolies ⇐24(15)

In enforcement of antitrust laws through maintaining line of business restrictions on regional telephone companies pursuant to consent decree, consumer protection, including protection against unreasonably high rates, was an appropriate concern and not contradictory of antitrust principles. Clayton Act, § 5(b)(2), 15 U.S.C.A. § 16(b)(2).

13. Monopolies ⇐24(15)

Congressionally declared goal of universal telephone service could be legitimately taken into consideration in determining whether to maintain line of business restrictions on regional telephone companies pursuant to antitrust consent decree. Communications Act of 1934, § 1, 47 U.S.C.A. § 151.

14. Monopolies ⇐24(15)

Consideration of policies embodied in the First Amendment in promoting diversity of sources of information was appropriate in antitrust action in determining whether to maintain line of business restrictions in consent decree, preventing provision of information services by regional telephone companies. U.S.C.A. Const. Amend. 1.

15. Constitutional Law ⇐90.1(9)

Consent decree entered into in antitrust case, prohibiting regional telephone companies from engaging in information services business, did not constitute an infringement of the companies' First Amendment rights. U.S.C.A. Const.Amend. 1.

16. Monopolies ⇐24(15)

Court in antitrust suit could properly consider the probable deleterious effect on American foreign trade of removing line of business restrictions on regional telephone companies.

17. Monopolies ⇐24(15)

Removal from antitrust consent decree of restriction on regional telephone companies participating in "unrelated businesses" was warranted.

Charles F. Rule, Acting Asst. Atty. Gen., Barry Grossman, Chief, Communications and Finance Section, Nancy C. Garrison, Asst. Chief, Communications and Finance Section, Edward T. Hand, Asst. Chief, Foreign Commerce Section, Ben Giliberti, Atty., Antitrust Div., U.S. Dept. of Justice, Washington, D.C., for U.S. Dept. of Justice.

John D. Zeglis, Jim G. Kilpatric, Francine J. Berry, Basking Ridge, N.J., Howard J. Trienens, David W. Carpenter, Chicago, Ill.,

telephone instruments is down dramatically.[329] More importantly, competition has brought about innovations in telephone features on a scale and variety unknown before divestiture.[330] While complaints about that divestiture and the ensuing inconveniences have by no means ceased, an understanding is beginning to emerge that these temporary dislocations are a necessary price for what the newly competitive marketplace can achieve.

It is the attempted destruction of that careful design that the motions now before the Court are all about. Almost before the ink was dry on the decree, the Regional Companies began to seek the removal of its restrictions. These efforts have had some success, in that they have tended to cause the public to forget that these companies, when still part of the Bell System, participated widely in anticompetitive activities, and that, were they to be freed of the restrictions, they could be expected to resume anticompetitive practices in short order, to the detriment of both competitors and consumers. Regional Company claims of wishing only to participate with others in long distance and other restricted businesses on a level playing field obscure the fact that there is no level playing field when one of the participants holds an unassailable franchise on the goal lines that no one else may touch without its permission.

By direction of the decree itself, the restrictions placed on the Regional Companies may be removed only if these companies demonstrate that "there is no substantial possibility that they could use their monopoly powers to impede competition in the markets they seek to enter." The decree rests on the premise that the incentive and the ability to act anticompetitively existed in 1984 when that decree was entered, and the question before the Court therefore is only whether events in the three years since then have changed that situation.[331] Essentially three types of changes are claimed to have occurred.

First, it is argued that the local monopoly bottlenecks have been either wiped out or substantially eroded. However, by the finding of the Department of Justice's own expert, these bottlenecks are still so pervasive that only one in one million telephone users is able to bypass them to communicate with his ultimate customers on his own; the remaining 999,999 users remain

in the monopolistic control of the Regional Companies which, as noted at pp. 581–82, *supra*, were able initially to raise these rates. However, as a consequence of greater public and regulatory awareness and resistance, local rates rose only slightly during the current year, while long distance rates continued their substantial decline. Indeed, state regulatory commissions turned local rate increase requests in the first half of 1987 into rate reductions totalling $92.6 million. *Communications Week*, August 24, 1987, at 30.

329. When the Bell System monopoly had full control, it refused to sell its telephones to consumers, or to permit anyone else to sell them, preferring to charge rentals in the neighborhood of $5–7 per month or more, for a total in, say thirty years, of over $2,000. Today, telephone instruments can be purchased in retail stores everywhere for $25–30 and up. Even if new instruments were purchased from time to time, the total cost would still be far below the unending rental fees.

330. There are now on the market at reasonable prices such by now commonplace features as residential telephones that are able to memorize dozens or hundreds of different phone numbers; telephones that repeat the last number called until it is no longer busy; cellular phones for business and emergency use; cordless phones; instruments that can be instructed by voice (*e.g.*, in an automobile) to call a certain individual, office, or number; and many others.

Parallel with the development of equipment that provides greater accessibility to the telephone user, devices are being produced and marketed that, in a sense, operate in the opposite direction: some of them display the caller's number before the receiver has been lifted; others provide a distinctive ring when a call is received from a number previously designated as worthy of priority consideration; still others automatically block calls from persons with whom the phone's owner does not wish to speak. For the first time since the invention of the telephone, these devices are returning control to the instrument's owner from every salesman, unwelcome relative, or even crackpot who may decide to call at any hour of the day or night.

It is surely not a coincidence that these features, and many more, have become available since the Bell monopoly was ended by divestiture and competition began to reign in the telecommunications marketplace.

331. *See* Part II, *supra*.

The Court invited interested persons and organizations to intervene in this proceeding and to file responses to the report and the motions, and the parties as well as the intervenors were given the right to file additional memoranda and replies.[4] A total of some 170 organizations and individuals availed themselves of the opportunity to intervene. In addition to submissions from AT & T, the Department of Justice, and the seven Regional Holding Companies (hereinafter referred to as the Regional Companies),[5] lengthy and thoughtful memoranda were also filed by competitors or potential competitors of the Regional Companies, representatives of state governments and state and public regulatory bodies, consumer organizations, labor unions, trade associations, and others.

The Court received a total of about three hundred briefs, totalling some 6,000 pages, including oppositions, responses, replies, and factual appendices, and it heard oral argument for three days from attorneys representing the parties, the Regional Companies, and the major groups of intervenors. This Opinion and the accompanying Order dispose of all the current controversies involving the retention or removal of the line of business restrictions.[6] The Opinion is organized as follows.

There are two introductory sections—Part I, Background; and Part II, Standard for Removal of the Restrictions. The following three sections address specifically the core restrictions—Part III, Interexchange Services; Part IV, Manufacturing; and Part V, Information Services. The next two sections provide additional information on the removal issue—Part VI, Regulation; and Part VII, Current Anticompetitive Activities and Public Policies. Two sections deal with what may be regarded as non-core restrictions—Part VIII, Information Transmission; and Part IX, Non-Telecommunications Services. The last section, Part X, is the Conclusion.

I

Background

The present controversy had its genesis shortly after World War II. At that time the government became concerned about apparent violations of the antitrust laws by the Bell System,[7] and in January 1949, an action was brought against that System by the Department of Justice which sought, among other things, the separation of telephone manufacturing from the provision of telephone service. The lawsuit was settled seven years later under circumstances which, in the opinion of the Antitrust Subcommittee of the House Committee on the Judiciary, indicated the presence of political and other corrupt influences. *See* Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess., January 30, 1959 (Committee Print).[8]

refer herein both to the Bell Operating Companies and to the Regional Holding Companies as the Regional Companies. *See also* note 5, *infra*.

4. *See United States v. American Cyanamid Co.*, 719 F.2d 558, 564 n. 6 (2d Cir.1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984).

5. The parties and others have also referred to these firms as RHCs, Bell Companies, or Operating Companies. In conformity with the Court's policy to avoid, to the extent possible, initials and expressions not comprehensible to the uninitiated, it will refer to the firms as the Regional Companies, to the local operating firms as the Operating Companies rather than the BOCs, and to the judgment in this case as the decree rather than the MFJ.

6. On December 9, 1986, AT & T filed a motion requesting that the responsibility for screening requests for individual waivers of the line of business restrictions prior to Court action thereon be transferred from the Department of Justice to the Federal Communications Commission. That motion has since been withdrawn, and it will therefore not be decided or discussed herein.

7. Prior to the 1984 divestiture, the terms "Bell System" and "AT & T" were in the main used interchangeably. To avoid confusion with the present truncated AT & T, the Court will herein generally refer to the predivestiture company as the Bell System.

8. For a description of some of the circumstances surrounding the Department's about face that led to the 1956 settlement, *see AT & T*, 552 F.Supp. at 135–38. The Department of Justice's change of position resulting in that settlement was partially responsible for the enactment of

respect to entry into non-telecommunications markets.

It seems fairly clear that the restriction itself may safely be removed pursuant to section VIII(C) of the decree. Almost all of the parties and intervenors that have addressed the section II(D)(3) issue have concluded that there is no substantial risk that Regional Company participation in non-telecommunications business would permit leveraging of exchange monopolies.[323] That conclusion is also supported by the experience that, following review by the Department of Justice and the Court, every one of the waivers requested in this field was granted.

More problematical is the cross-subsidization issue that the Court sought to address in part by the conditions it attached to the waivers. There is no question but that the removal of the restriction on entry of the Regional Companies into non-telecommunications markets does raise the concern that their operations in these markets will be subsidized by revenues extracted from the rates that are being paid ostensibly for local telephone service. Indeed, as discussed in Part VII, particularly pp. 581–83, *supra*, notwithstanding various restrictions and conditions, such diversions appear to be taking place even now.

As against this continuing problem must be weighed that (1) there is little demand from potential competitors for retention of the restriction; and (2) the relative paucity of joint and common costs between exchange operations and non-telecommunications ventures renders it more difficult to cross-subsidize on a continuing basis in large amounts in this area than in telecommunications-related markets.

In the opinion of the Court, while the issue is by no means open and shut, the balance of factors favors the removal not only of the restriction itself but also of the conditions heretofore attached to restriction waivers. That balance is achieved in part by several public policy or cost-benefit factors (Part VII–B): (1) the waiver process with respect to this non-telecommunications field places a substantial burden on Regional Company planning and decision-making; and (2) this process involves the Court on a fairly significant scale in Regional Company business decisions when the final outcome, at least thus far, has always been the issuance of a waiver; and (3) if the restriction itself has become obsolete, the retention of conditions becomes somewhat unrealistic.

Absent weightier competitive considerations than are present here and now,[324] it is appropriate, therefore, that these companies be freed of detailed judicial oversight of their decisions. There is, of course, independent philosophical utility in a departure of a judicial body from the adjudication of matters that are not likely to present substantial problems in terms of compliance with the antitrust laws.[325]

For these reasons, the Court will remove the restriction embodied in section II(D)(3) of the decree on the entry of the Regional Companies into non-telecommunications ventures. Consistently with that decision, the four conditions heretofore imposed as part of past waivers of the section II(D)(3) restriction will also be dissolved.

323. *See, e.g.*, National Association of Regulatory Utility Commissioners, *Summary Report on the Regional Holding Company Investigations* at 5 (Sept. 18, 1986); *see also Western Electric Co.*, 592 F.Supp. at 853.

324. There is, to be sure, also the somewhat more amorphous risk that the Regional Companies, in their zeal to diversify, will neglect the relatively pedestrian, regulated telephone operations, and concentrate their resources and managerial skills instead upon more glamorous, albeit more speculative, business opportunities. At least one of the usual waiver conditions was designed to deal with this issue. However, it is at least conceivable that the FCC, possibly with a mandate from the Congress, will see its way clear to address this problem should it assume substantial significance.

325. Some have suggested, *e.g.*, Computer and Business Equipment Manufacturers Association at 28, that termination by this Court of the waiver process could result in the filing of a great number of separate antitrust suits throughout the land. For the reasons stated, the Court does not believe it likely that many meritorious antitrust actions will develop.

to cross-subsidization between the Bell System's regulated and its unregulated activities that "[o]ver the last fifteen years, the Federal Communications Commission has both recognized and attempted to come to grips with this problem ... but its experience has not been a satisfactory one and it has not been able to establish standards and implement them" (Tr. 9347–48). Professor Melody further stated, in response to questions by counsel for the Department of Justice as to whether regulation could be made effective so as to prevent the anticompetitive practices he had described, that it was "very clear on the basis of ... the entire history of the FCC's attempt to deal with the problem, that there is no way to come to grips with the problem operationally, that AT & T's monopoly power, which extends far beyond the scope of the FCC in terms of its regulation, creates a situation where there is just simply no hope that this could ever be effectively done [by regulation]" (Tr. 9512–13).[13]

Similarly, Dr. Nina Cornell, another government witness, testified that she had analyzed the effectiveness of regulation for achieving effective competition in the telecommunications industry from an economic perspective, and she had concluded that "I don't think regulation can achieve effective competition in the industry" (Tr. 10641). In her opinion, regulation is particularly weak in an area such as telecommunications where the pace of technological change is very fast (Tr. 10858–59).[14]

Significantly, even the two officials who, as heads of the FCC's Common Carrier Bureau for the fifteen years between 1963 and 1978, had been in charge of the regulation of the Bell System during that period, agreed with these assessments. Thus, Walter Hinchman, who was chief of the Common Carrier Bureau from 1974 to 1978, said that "I didn't feel that ... we were at all effective in ... controlling competitive practices or creating an environment for really full and fair competition" (Tr. 10469–70), and that, for a variety of reasons, there was a special regulatory void with respect to the Operating Companies (Tr. 10475).[15] Bernard Strassburg, chief of the Bureau from 1963 to 1973, concurred, testifying that the Commission had a limited budget; that it had to rely to a large extent upon the Bell System to supply it with technical information; and that its expertise to go behind the Bell System's representations was also extremely limited (Tr. 17312).

Based upon this and other evidence, the Court concluded following the close of the Department's case, and in accordance with the arguments presented by the Department,[16] that "the Commission is not and never has been capable of effective enforcement of the laws governing AT & T's behavior," and that accordingly AT & T had been able to violate the antitrust laws in a number of ways over a long period of time with respect to interexchange services[17] and the procurement of equipment. *AT & T*, 552 F.Supp. at 168, 170, and nn.

13. According to the witness, the FCC "has undertaken a massive investigation ... and it has attempted to establish and implement standards that would enable it to judge and to regulate on this basis [but] after about twenty years of trying the FCC has now for all intents and purposes, in my judgment, given up on the task" (Tr. 9353). Professor Melody explained in some detail why the relatively small FCC staff was unable to penetrate to the end and in the necessary depth the voluminous and complex Bell System studies, supporting programs, computer programs, and raw data.

14. Other witnesses, and voluminous documentary material, supported these conclusions.

15. In the witness' opinion, telecommunications regulation is inherently ineffective because "many different services, or ... variations on a type of service ... can be satisfied by the same facilities which ... leads to a very high degree of what are termed common costs of operation, and one of the major problems in regulation is determining how to properly distribute and attribute those common costs to various services" (Tr. 10489).

16. Department of Justice Memorandum dated August 16, 1981, at 46–47, 125 n. *, 161–62, 281–82, 285, and 374.

17. For technical reasons, what is popularly known as long distance service is referred to in the decree and will be referred to herein as interexchange service. Interexchange service does not include long distance calling that takes place within a LATA. For an explanation of that term, *see* pp. 540–41, *infra*.

in interpreting it, and in passing upon motions and other requests from the parties. Further, as there stated, notwithstanding the contrary views of the Regional Companies and the Department of Justice,[319] the Court has no doubt of its authority to continue to do so, where there is no inconsistency with the antitrust laws or the factors underlying the approval of the decree as expressed in the Opinion which effected such approval.

Accordingly, the Court will, in the present context, once again take into account values in addition to those stemming exclusively from an environment free of anticompetitive activity, in this case the benefits to the American public from expanded, intelligent, widely available information services transmitted through an infrastructure operated by the Regional Companies. The divestiture of the Bell System, and the decree which brought it about, were not mere exercises in abstract reasoning: they had as their fundamental purpose the promotion of competition in the telecommunications market, to the end that the American public, including the American consumer, might benefit from today's and tomorrow's telecommunications technology in this information age.

The wide dissemination of information services is a key ingredient in that design. As indicated, the French information services scheme permits individual citizens to secure an enormous number and variety of information services with ease and at reasonable cost. While the two nations are not comparable in many other ways, they are surely not dissimilar in regarding as a positive value the access of the citizenry to a variety of sources of information. To the extent that this objective can be promoted through a relaxation of the information services restriction in the decree along the lines outlined above, the Court is prepared to do so.

For the reasons stated, the Court will exempt from the information services restriction the transmission of information generated by others in the manner and to the extent described above. However, in light of the not fully complete descriptions in the record of the various ingredients that are necessary to an information transmission system, juxtaposed against the need for precision (*see* pp. 596–97, *supra*), the parties and interested intervenors are invited to submit proposed orders, accompanied by memoranda, consistent with this Opinion, detailing the necessary ingredients with greater particularity.

IX

Non-Telecommunications Services

[17] Section II(D)(3) prohibits the Regional Companies from "provid[ing] any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." *AT & T*, 552 F.Supp. at 228. This catch-all restriction prohibits the companies from participating in "unrelated businesses" in which they might have the ability to obtain improper competitive advantages by leveraging their control over the local monopolies. *Id.* at 195 n. 267.

Unlike the core restrictions, the section II(D)(3) prohibition was not imposed on the basis of any specific evidence of anticompetitive activity in non-telecommunications markets by AT & T or its subsidiaries, nor could it have been: by virtue of the 1956 consent decree, the Bell System was not engaged in non-telecommunications business enterprises. Section II(D)(3) rested instead on the proposition that, when an entity with a significant telecommunications monopoly enters some other, competitive business, there is both an incentive and an ability to act anticompetitively. The restriction also reflected the notion that, by limiting the Regional Companies to traditional local exchange services, the goal of the provision of efficient, economical telephone service would be furthered. *Western Electric Co.*, 592 F.Supp. at 855–58.

319. The Department has, however, acknowledged the legitimacy of a cost-benefit test. *See* p. 587, *supra*.

of anticompetitive activities by those in control of those monopolies.[23]

In its Opinion explaining the decree,[24] the Court stated that proceedings addressing the continuing viability of the line of business restrictions

> should be governed by the same standard which the Court has applied in determining whether [the restrictions] are required in the first instance. Thus, a restriction will be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market.

AT & T, 552 F.Supp. at 195 (footnote omitted).

The rationale for a particular restriction may cease to provide a sufficient basis for continued application of that restriction, if, as the Court stated in 1982, the Regional Companies lost their "ability to leverage their monopoly power into the competitive markets from which they must now be barred." *Id.* at 194. It was anticipated that this would occur when technological developments eliminated the Regional Companies' local exchange monopolies or when substantial changes occurred in the structures of the competitive markets. The Court observed that, upon the happening of such events, the need for the restrictions might be fundamentally undermined. *Id. Accord*, 592 F.Supp. at 858–59, 868; 627 F.Supp. 1090, 1098 n. 26 (D.D.C.1986).

[1] It is important, however, to note precisely what it is that section VIII(C) mandates. That provision places a direct burden upon those who request a removal of a line of business restrictions, for it mandates that any such petitioner *must make a showing*[25] that there is *no substantial possibility* that it *could* use its monopoly power to *impede* competition in the market it seeks to enter. As the underlined language indicates, a Regional Company will not be relieved of a restriction if it makes no showing at all,[26] or if it merely

23. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 860 n. 51 (D.D.C.1984); oral argument of James P. Denvir on behalf of the Department of Justice ("In a very real sense, the restrictions are simply the opposite side of the divestiture coin, they are an integral part of the divestiture and proceed on precisely the same theory that divestiture proceeds on") (Tr. 25179).

24. Varying views have been expressed by the parties and intervenors concerning the meaning of section VIII(C). To the extent that the language of that provision requires explanation through its history and purposes as well as the circumstances surrounding its inclusion in the decree, the Court is in a more advantageous position to provide such explanations than is usually true in consent decree situations, for several reasons.

First, unlike in the typical consent decree case, this decree was filed after almost all the substantive evidence of alleged antitrust violations had been presented to the Court, rather than in lieu of the taking of evidence. *Compare* 15 U.S.C. § 16(b)(2). Second, unlike in the typical consent decree case, the Court conducted an extensive Tunney Act proceeding in the course of which it heard both on principle and on language from many sources, including the Department of Justice, AT & T, and the chief executives of several of the soon-to-be-established Regional Companies. Third, unlike in the typical consent decree case, where the Court simply ratifies language agreed upon by the parties, the Court here was the author of section VIII(C), the very provision at issue in the present proceeding. Fourth, the Court provided in 1982 an extensive contemporaneous explanation of the decree (*AT & T, supra*, 552 F.Supp. at 131), which no one has questioned as an authoritative interpretation.

25. Anyone attempting to overturn one of the restrictions properly bears a particularly heavy burden because of the strong interest of litigants and the public in the finality of judgments. Many enterprises appear to have made crucial business decisions and invested millions and even billions of dollars in reliance on the ground rules established *inter alia* by the line of business restrictions. *See* Response of United Telecommunications, Inc., at 10, which claims to have invested nearly $2 billion "in reliance on the commitment that the BOCs would not be allowed into the interexchange market so long as they could impede competition." This kind of not unreasonable reliance in light of the language of the decree is a factor supporting the proposition that the restrictions should not be lightly overturned.

26. Thus, the Regional Companies are in error when they approach the issue—as several of them do, *see* pp. 534–35, *infra*—as if if the Court had the obligation to engage in a fresh balancing of considerations in the same manner as would be done in a new antitrust action, or even further from the truth, as if the particular restriction had to be affirmatively justified in this proceeding. The restrictions have already

ty to engage in anticompetitive behavior, this introductory content must be strictly limited to (1) the display of a welcoming page and (2) provider listings.

A welcoming page could advise the consumer of the billing arrangement that was established for a particular information service, and it would provide for the prompt entry of the code or the name of the desired information service provider. Neither of these should cause any competitive problems.

A provider listing could, for example, contain in addition to the providers' names, addresses, and telephone numbers, their business, product, or service categories. With this information as a database, the Regional Companies could establish systems which would allow the consumer to search in any of these categories. The companies might wish also to cross-reference the names of the providers, their codes, and the like. Such a cross-reference would not only give broader exposure to the various available providers but it would also facilitate consumer access to the services.

However, service menus, which some of the Regional Companies are seeking, are in a different category. Menus of information services and options within those services are the essential means for navigating about that system, that is, for directing the consumer in its use, such as in obtaining or transmitting the desired information or in performing certain transactions. Menus are a matter of editorial control, specifically tailored by the particular information provider, and as such they tend to be closely interrelated with information content. If the Regional Companies could furnish such menus, there would be a breach in the boundary between information services needed for transmission that only insignificantly affect content, and those that do constitute content and accordingly establish opportunities for anticompetitive conduct. On this basis, the provision of the menu service cannot be permitted consistently with the basic structure and purposes of the decree.

G. *Electronic Directory Service*

Several intervenors claim that the provision of electronic directory services by the Regional Companies is a necessary component of the infrastructure, and that it, too, should be permitted.[311]

The basic rationale advanced in support of this assertion is that the consumers will become better acquainted with videotex services generally through use of the electronic directories. That rationale, while it does contain a grain of truth, is not adequate to support removal of the information services restriction with respect to the provision of electronic directory services generally.

The Regional Companies are currently permitted to compile and distribute "Yellow Pages" directories. If they were also allowed to provide their electronic counterpart, they would plainly have the incentive and ability to discriminate both against competing providers of directory services and against the publishers of classified and other advertisements.[312]

As the Court indicated in 1982, with respect to the prohibition on electronic publishing by AT & T, it is too easy and too tempting for a company engaged in both the generation of information, whether political or commercial, and its transmission, to discriminate against competitors who lack the ability to exercise the transmission function. In view of the time-sensitive nature of most such material, discrimination activity by a Regional Company could profitably include the practice of giving priority to its own publishings, and that of using for its own ends information learned in the

311. *See, e.g.*, VIA Comments at 10.

312. Yellow Page-type advertisements transmitted and published electronically could easily be updated weekly or even daily, and on this basis they could and no doubt quickly would compete directly and on favorable terms both with current-type newspaper advertisements, and with those who would use the new information network to publish their own electronic advertisements. Although, for the reasons stated, Regional Companies cannot be permitted to enter this market, there is no reason why others—whether or not they are now in the publishing business—could not do so.

ers, U S West also insists upon treating the current proceeding as if it were a new antitrust action in which no judgment had ever been entered.[36]

[3] In view of the fact that what is before the Court is not a new antitrust suit in which the plaintiff would have the burden of proof, but requests for changes in a decree that became final several years ago, these contentions can only be characterized as frivolous. It is plain that collateral attacks on such a decree are inconsistent with the law of the case rule,[37] and equally plain that section VIII(C) does not require full-fledging proof of a new "antitrust injury," but that it speaks only of a "substantial possibility" that a Regional Company "could" impede competition.

More fundamentally, there is not the slightest indication in the record surrounding the negotiation or the approval of the consent decree that, absent the most substantial alteration of market conditions, a judgment that was to end over thirty years of strife in the telecommunications industry and to establish new conditions to govern that industry thereafter, was to be dissolved with respect to one of its two critical elements immediately or almost immediately after entry.[38]

The Department of Justice goes to some lengths to refute AT & T's point that it agreed to the decree so as to prevent litigation and other controversies regarding the leveraging of the monopoly power, and that the Court should not unnecessarily cause the revival of such controversies.[39] In one sense, the Department is entirely correct. Restrictions may not be maintained solely or at all to avoid controversy.

However, the Court cannot help but reflect that one significant reason for the Bell System's agreement to enter into the consent decree was its weariness with constant controversy in the courts, the Congress, before the FCC, and before local regulators, and its willingness to trade those controversies about monopoly bottlenecks for an ability to compete in the interexchange and manufacturing markets without being burdened with the very kind of competition from monopolists that it was just abandoning. *See, e.g.*, AT & T Comments at 7–8; Coll, *The Deal of the Century*, at 300–02. The Bell System could not know, and surely did not expect, that the word of the United States Department of Justice would be good only for as long as

"must make a showing" because, it is claimed, the provision applies only to "the petitioning BOC," not the Department. Even the Department of Justice does not make such a claim. In any event, if the language relied on by Bell-South does not apply to the Department of Justice, that Department may petition for a change in the decree only under the more right *Swift* standard.

36. US West Reply Memorandum at 1–17.

37. *DeTenorio v. Lightsey*, 589 F.2d 911 (5th Cir. 1979); *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788 (1981). As MCI aptly observes (Reply at 5):
> The fundamental unfairness of the Department's and Regional Companies' efforts to relitigate principles already finally resolved in this case might be more apparent if AT & T or MCI responded with a list of all those rulings they found disappointing and wished to relitigate at this time as well. MCI, at least, would be pleased to ask the Court's reconsideration of a range of rulings beginning with the size of the LATAs (*see United States v. Western Electric Co.*, 569 F.Supp. 990, 1003–1008 (D.D.C.1983)), and ending with NYNEX's acquisition of a conditional interest in Tel-Optik (*see United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C. Aug. 2, 1986)) [Available on WESTLAW, DCT database]. But even when limited to issues that have not previously been resolved, this proceeding is sufficiently complex.

38. Claims to the contrary—that the restrictions were justified or intended to apply only immediately after divestiture, *see, e.g.*, Southwestern Bell Comments at 2; FCC Comments at 4—are so devoid of legal and factual support that, were it not for the fact that there appears to be no practical way to sort out a few statements out of many, and the further fact that several assertions by others are likewise close to or below the acceptable line, sanctions under Rule 11, Fed.R.Civ.P., would have been imposed. *See also Western Electric Co.*, 569 F.Supp. at 1090 n. 139, where the Court referred to the successful invocation of section VIII(C) as "an event, if ever" it should come to pass.

39. Department of Justice Response at 20–23.

tion sent or received, and neither requires a specific amendment of the decree, or poses a threat to competitive parity.

The generation of characters that appear on the terminal screen constitutes an echoing of consumer-generated keystrokes for the purpose of confirming successful reception as part of the transmission function. Although it is asserted by some that provision of this type of service could affect the content of the information sent or received —for example when the format of the information provider's computer application, which uses color as a necessary component to the interpretation of the message sent, is changed so that the receiving terminal, which has only a "highlight" and "shade" capability and no color capability, can receive that message in a meaningful manner—the degree to which such a transformation could affect content is insubstantial. In the judgment of the Court, performance of this function by the Regional Companies will not create any significant opportunities for anticompetitive conduct.

If the Regional Companies are permitted to provide these services, much of the need for sophisticated hardware and software at the user's end of the system otherwise necessary for the achievement of access to information services would be obviated: the network itself would be performing functions otherwise performed by the user's more sophisticated computer.

2. *Address Translation*

Through address translation, the consumer will be enabled to use an abbreviated code or signal provided to him in order to access the information service provider in lieu of dialing the telephone number of the desired provider.[307] Translation of the consumer's request for service in this manner would obviously facilitate accessibility of the system. Performance of this function by the Regional Companies likewise involves only a minimal manipulation of content, and it, too, poses no significant risk of anticompetitive conduct.[308]

3. *Protocol Conversion*

Protocol conversion facilities undertake electronic translation in order to facilitate the communication between information service providers. They perform this task by altering and reconfiguring message content at the machine level, for example, by converting the asynchronous signals that a "dumb" terminal sends and receives to the more efficient X.25 packet signals. Protocol conversion services are essential, low-level network support systems. Huber Report at Table IS.10.

Provision of these conversion functions by the Regional Companies is necessary to take advantage of the decreased transmission costs described above. As there noted, independent providers would not have the incentive to disperse the conversion facilities on a wide basis since such dispersion would increase their packet switched transmission costs.[309]

Protocol conversion, then, is a key infrastructure component necessary to the development of a mass-market for videotex. Some simple forms of protocol processing do not involve any changes in form or content of the information sent, and their performance by the Regional Companies poses no risk whatever. However, a sophisticated and effective system of information transmission requires also that the network perform those protocol conversion

307. In the French VAP, this service consists of the translation of a mnemonic code into the telephone number of the desired information service provider.

308. While it has been argued by some that the Regional Companies are entitled to provide this service even now under the decree as part of the permissible "forwarding or routing" functions of "information access," *see* section IV(I) of the decree, the Court has concluded otherwise, particularly since section IV(F) prohibits interexchange routing. Accordingly, the legality of the performance of this function will require an appropriate amendment of the decree. In any event, provision of this service by the Regional Companies, in conjunction with the other infrastructure components described herein, is a necessary component in the provision of an impetus for growth of a mass-market for videotex services.

309. Limited dispersion would not only preclude the possibility of decreased transmission costs, but it would also constrict the transparency of communication between the consumers and providers.

that question unequivocally in the affirmative.[44]

[5] First. Most of the Regional Companies contend that they do not retain their monopoly power over the local bottlenecks. For example, U S West argues that it lacks bottleneck monopoly power because there now exists substantial consumer bypass.[45] Ameritech goes to some lengths to attempt to demonstrate that competition has reduced the Regional Companies' market power: it points to the existence of competitive alternatives for the switching and privatization of telecommunications systems, end user purchase of switches, and a diminished pool of monopoly revenues for subsidizing competitive products and services.[46] Ameritech Comments at 12–14; *see also* Bell Atlantic Comments at 12–14; BellSouth Comments at 37–38; and U S West Comments at 40–41.[47]

There is no basis for any of these claims, and no serious effort is made to undermine Dr. Huber's findings to the contrary. Almost all the parties and intervenors other than the Regional Companies themselves acknowledge the continued existence of Regional Company monopoly power.[48] The Department of Justice, for example, does not urge removal of the restrictions on the ground that the local exchange has lost its bottleneck characteristics; to the contrary, it concedes that the exchange services continue to be monopolies, and that the Regional Companies continue to retain their monopoly power over "the local exchange bottleneck."[49] As explained *infra*, these assessments are correct; the Regional Companies do retain that power over the local bottlenecks, and there is little "bypass" of their switches and circuits.

The exchange monopoly of the Regional Companies has continued because it is a natural monopoly.[50] Local exchange com-

44. In making this and other determinations, the Court has fully considered the legal and factual submissions of the parties and intervenors. On the facts, it necessarily relied to a considerable extent upon Dr. Huber's excellent and thorough study, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, although it did not agree with all of his conclusions. However, other expert opinions have also been considered, the weight being given to them obviously depending upon such factors as the specific knowledge of the particular individual and the detailed or conclusory character of the affidavits and other papers, as the case may be.

Consideration of the affidavits and other materials revealed differences in emphasis and even differences in ultimate opinions, but on most issues critical to the Court's decisions there is a surprising amount of agreement on the actual facts, as distinguished from argument or conclusions drawn from the facts.

No party or intervenor has suggested that a formal evidentiary hearing be held—quite the contrary, *see, e.g.*, US West Reply Memorandum at 6 n. 3—and in this proceeding, which in a sense is a continuation of the Tunney Act proceeding, and which involves some 175 different parties and intervenors, with a wide variety of interests for possible examination and cross-examination purposes, that would in any event have been both inappropriate and impractical.

45. Memorandum of April 27, 1987 at 139–43. Bypass is deemed to exist when a telephone customer is able to reach those with whom he wishes to communicate without the use of the facilities of a Regional Company or its equivalent in the territories serviced by independents. All of these local facilities, both those of the Regional Companies and those of the independents, are encompassed in the general term "local exchange carrier," or LEC.

46. As shown in Part VII–A–2, *infra*, statistics indicate that the Regional Companies have probably subsidized their competitive ventures with monopoly revenues even in the three years since divestiture, and even though their entry into competitive businesses has thus far been necessarily relatively small.

47. U S West's report on bypass (Appendix Tab 31) is forced to recognize, however, that those whom it regards as bypassing the Regional Companies are using those companies as the "pipe through which data or voice is transmitted" (p. 5), and that even the traffic of a customer who has aggregated his traffic and uses PBX switching systems is carried over "relatively few" Regional Company access lines (p. 68). *See also* pp. 538–39, *infra*.

48. Even some of the Regional Companies do on occasion concede the existence of such power. Ameritech Response at 10–11; Pacific Telesis Further Comments at 15–16, 29; Southwestern Bell Response at 9.

49. Department of Justice Response at 15; *see also* letter dated October 2, 1986, from then Assistant Attorney General Douglas H. Ginsburg to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce, at 12.

50. *See* Hearing before the Senate Committee on Science and Transportation, 97th Cong., 2d Sess.

whether information services would be accepted by both providers and consumers on a sufficient scale to render it economically feasible as well as socially useful.[296] Indeed, no one could ever know the answer to these questions unless legal obstacles to the provision of the services are removed.

After considering the subject in some detail and with great care, the Court has become convinced, first, that, if the authority of the Regional Companies is carefully limited, the risk of anticompetitive action by these companies, while not insignificant, is, on balance, outweighed by other considerations (*see infra*); second, that the broad scale and the reasonable cost criteria necessary for a successful system can be met only by permitting the Regional Companies to provide the necessary infrastructure components for efficient videotex services on an integrated basis;[297] and third, that it is probable that a well-run, adequately publicized system could perform a useful service, and that it might attract a sufficient number of subscribers so that it could operate on an economically sound basis.[298]

E. *An Economically Sound System*

If the Regional Companies operated the key infrastructure components, the expense associated with the provision of videotex could be reduced substantially and the services themselves would be more readily accessible. *See* Affidavit of Dr. Almarin Phillips submitted on behalf of U S West; Affidavit of Professor Jerry A. Hausman on behalf of Pacific Telesis. More specifically, the data indicate that Regional Company ownership of "gateway" facilities similar to French VAPs would decrease the cost of providing videotex.

Gateways[299] would permit the conversion of the asynchronous signals that an inexpensive "dumb" terminal sends and receives to more efficient X.25 packet signals. Since asynchronous transmission is much more expensive and much slower than X.25 packet transmission, wide dispersion of the gateways would decrease the duration of asynchronous transmission and hence overall transmission costs. Such a reduction in transmission costs may be expected also to reduce substantially the cost of the videotex service to the consumer, and the increased demand generated thereby presumably would, in turn, increase the number of information voices available to the public.[300]

Possible alternatives are not similarly attractive. If the gateways did not perform these conversion functions, they would have to be performed either by the individual terminals or by the various providers of information. Conversion by the terminals would necessarily increase significantly the required sophistication and consequently the cost of these terminals. If prospective

296. American Newspaper Publishers Association believes that such services have blossomed whenever one or more of the following factors has generated a willingness by the market to pay for the service: (1) a need for highly current information; (2) a need for automated, intensive searches among large amounts of indexed material; and (3) a need to manipulate information, mathematically or otherwise, as well as to obtain information. Comments at 21.

297. The ability of the Regional Companies to engage in low-level network functions on an integrated basis, such as those described below, would result in more efficient provision of those services by decreasing the cost and increasing the accessibility of those services. This, in turn, could foster a mass market for videotex services.

298. The consensus to that effect reaches all the way from U S West, a Regional Company, to the American Newspaper Publishers Association, a publishing association.

Not everyone agrees, of course. For example, ADAPSO states that the French experience is meaningless in American terms, and that the United States has even now the world's largest, most successful, most sophisticated information services industry. Comments at 46–48. Whether or not that assessment is correct—and this depends primarily upon what is being counted and how—there would appear to be no question that more efficient distribution of the services would significantly increase their availability and hence their usefulness.

299. As used herein, the term "gateways" is limited to facilities, similar to the French VAPs, that are described below. It does not include other facilities that under other circumstances may be included within the meaning of that term.

300. If the network itself performed certain gateway services, even small data base providers could afford to compete in the information services market.

Some of the Regional Companies, while conceding that residential and small business users cannot do without the Regional Company monopoly bottlenecks, assert that this is not true with respect to the large users.[57] As the Huber Report conclusively demonstrates, however, that is just not so. The Report notes that even very large private network customers still employ far more switched (*i.e.*, Regional Company) access lines than dedicated (*i.e.*, private) access lines. Huber Report at 3.44–3.46. As the Report further found:

> Users' requirements for a bundle of local and interexchange services can make any discrete focus on alternative high capacity systems misleading. *Control over a single, essential piece of network, even a seemingly small and comparatively inexpensive one ... may give LEC's [i.e., Regional Companies] 'account control,'* that is a guaranteed foot in the door with large customers, a window on their business, and the power to insist on dealing directly with them (emphasis added.)

Huber Report at 3.45. And Dr. Huber further concluded that fully forty to fifty percent of large business customers' payments for private networks are attributable to access provided by Regional Companies. Report at 3.46–3.49, Figure IX.30, Table IX.31.

To be sure, the Department of Justice and Dr. Huber refer at some length to technological developments,[58] particularly the emergence of a geodesic network.[59] However, they both acknowledge—as they must—that the geodesic network does not now exist, and that all these developments will, if ever,[60] impact the Regional Companies bottleneck control only in the future.[61] Department of Justice Report at 42–43; Huber Report at 2.23, 2.25–26.[62] Indeed, the Department relies on Huber's conclusion on the dispersal of electronic intelligence only for the proposition that it would support many interconnected, vertically integrated providers. *Id.* at 1.6–1.7, 1.30.

57. *See, e.g.*, BellSouth Comments at 37–38; Bell Atlantic Comments at 10–13.

58. The broadening consumption of electronic equipment, for example, does not reduce the need for Regional Company transmission services; it may actually increase it. *See* Comments of Independent Data Communications Manufacturers Association, at 18–19.

59. These technological developments form the basis for Dr. Huber's conclusion that the exchange network is being transformed from a "pyramid" to a "geodesic" network. Huber Report at 1.2, 1.6. According to Dr. Huber, in a pyramid network, there are relatively few switches that are arranged in a vertical hierarchy. This vertical switching network was predicated on the allegedly earlier economic reality that switching was very expensive relative to transmission, and the local Operating Companies had a bottleneck monopoly over entry into the network because they controlled the gateway switches. In a geodesic network, according to Dr. Huber, the number of switches and connections between them are much greater, and consequently the processing and control functions are decentralized. Dr. Huber accordingly concluded that transformation to geodesic networks will be due to the decrease in costs of switching and processing brought about by technological innovation. Huber Report at 1.2–1.6. A geodesic network erodes bottleneck control, he contends, because, in contrast to the pyramid which could support only a single integrated provider of telecommunications services, it can

60. AT & T challenges the very premise of Dr. Huber's geodesic network theory, claiming that it rests on a misunderstanding of principles of engineering and network design so basic that they were stipulated to by the parties to the *AT & T* case. AT & T Comments at 50–51 n. *. Since it is clear, as stated *infra*, that, whatever may be its future, the geodesic network does not exist *now*, it is not necessary to resolve that dispute.

61. It is thus ingenuous to speak of the geodesic network as if it existed at the present time. *See, e.g.*, Response of NYNEX at 14 ("Thus, as Dr. Huber notes, 'the geodesic network *is* structurally competitive'" (emphasis added)). No such statement can be found at the page cited.

62. An analysis conducted by experts in telecommunications economics and regulation for Economics and Technology, Inc., and submitted to the Court by the Ad Hoc Telecommunications Users Committee and the International Communications Association, likewise concludes that "the geodesic model that Dr. Huber has envisioned does not now characterize the U.S. telecommunications system, nor will it do so in the foreseeable future." Analysis at 11. The study also reports that virtually all the available information indicates that business tones are not more likely to be generated by PBXs than by Regional Company central office switches. Analysis at 36–40.

trols the Teletel system through the DGT, and it also subsidizes the system by giving away the Minitels free to all households.[285]

Videotex is also available, but on a much more limited scale, in Japan and, to some extent, in Great Britain.[286] The Japanese telephone company functions as a hardware-software vendor to a number of local emergency medical information systems that monitor, among other things, the availability of hospital beds and blood and serum inventories. Huber Report at 1.29 n. 47, Table G.18. The Japanese Automated Meterological Data Acquisition System collects weather data continuously from 1,400 reporting stations, Huber Report at Table G.18; a voice-mail system was instituted in Japan late in 1986, Bell Atlantic Comments at 54 n. 113; and Nippon Telephone & Telegraph makes available to customers a number of dial-up services, including news, weather, golf and ski conditions, travel, insurance, taxis, hotels, cooking, music, and English-language services. Huber Report at Table IS.21. Like the French company, the Japanese telephone company functions essentially only as a supplier of conduit, not of content.[287]

C. *Importance of Widely-Available Information Services*

As indicated, no videotex service on a similar scale exists in the United States. Before inquiring into the reasons therefor and into practical means for remedying the relative scarcity of such services without at the same time creating the risk of anticompetitive actions, it is appropriate to consider first whether and why the wide availability of information services through videotex might be beneficial.

It is a cliché to state that we live in an Information Age, but it is also true. Information is today as central to the service economy which increasingly prevails in this country as iron and coal were to England around the turn of the century. Whatever causes the more efficient, rapid, inexpensive dissemination of specifically needed and requested information[288] to all segments of the population, is likely to give this nation and its economy a significant advantage over countries not similarly equipped. More specifically, affordable videotex—the instantaneous availability to millions of Americans of needed information at low cost—could be expected to benefit the economy by providing increases in efficiency in information management and hence also in productivity. Outside the economic realm, broad and relatively inexpensive videotex would, of course, offer significant social benefits.

Without attempting to be exhaustive, the following lists some of the more obvious videotex-related economic services that exist elsewhere and that might be made available in this country: (1) in banking, videotex could give customers direct and immediate account information and fund transfer capability; (2) in brokerage, there could be instant evaluation of current portfolios and access to alternative investment opportunities; (3) with respect to customer service by a variety of business enterprises, arrangements could be made for immediate access to information about outstanding balances, order fulfillment, accrued interest, and the like; and (4) with respect to shopping services, videotex could provide direct and immediate access to the prices and descriptions of a wide range of prod-

285. According to reports, albeit from interested parties, there is no governmental subsidy for the French Teletel service, as the French telephone company expects to recoup its entire investment by 1990 or 1991. Presentation of Intelmatique, U S West Reply, App. Tab 2, at p. 5.

286. ANPA Comments at 16 (*citing* Department of Justice press release, at 9–10 (February 12, 1987)).

287. Reply Comments of ANPA at 7.

288. The United States of course does not suffer from a paucity of information. Newspapers, television and radio stations and networks, cable services, magazines, libraries, and other information sources exist in number and quality unmatched elsewhere. Videotex would fill a distinct niche, however, in that it would enable a participant to acquire specific information at a time when he needs or wants it, and it would permit him to do so without time-consuming, difficult research efforts.

exchange telecommunications" is defined as "telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." *AT & T*, 552 F.Supp. at 229. "Exchange areas," for purposes of the decree, are the Local Access Transport Areas (LATAs), established by the individual Regional Companies with the approval of the Court, *AT & T*, 552 F.Supp. at 229, each of the LATAs encompassing "one or more contiguous local exchange areas serving common social, economic, or other purposes." *Id.* Loosely speaking, interexchange service may be equated with long distance service (although some long distance service occurs within a LATA and is therefore not interexchange service within the meaning of the decree).

The factual predicate for the interexchange restriction was the large volume of evidence presented at the trial demonstrating that (1) the local exchange facilities operated for the Bell System by its twenty-two Operating Companies were essential for any firm that desired to provide long distance service, because without interconnection with the Operating Companies' switches and circuits it had no means of reaching the ultimate customer, the local possessor of a telephone instrument, and (2) the Bell System, through the Operating Companies, had consistently sought, often successfully, to exclude competition in the provision of long distance service by restricting interconnection to these local facilities. *AT & T*, 552 F.Supp. at 161–62; *AT & T*, 524 F.Supp. at 1358–57.

More specifically, the evidence indicated that the Bell System's refusal to provide local interconnection to its long distance competitors, such as MCI, on fair and nondiscriminatory terms and conditions, and its manipulation of the exchange access and of the tariff system,[70] precluded meaningful competition in the provision of long distance services. *AT & T*, 552 F.Supp. at 160–63; *AT & T*, 524 F.Supp. at 1358. To put it more directly, the Bell System managed for several decades by a variety of means to stave off significant competition in the long distance market, and to that effort the local Operating Companies and the monopolies they represented were the key component. All of this was done to protect the Bell System's own long distance component—the Long Lines—from outside competition.

In determining what remedy would most effectively protect in the future against similar anticompetitive abuses, both the parties and the Court carefully considered and rejected the alternative of improved FCC regulation. As explained elsewhere herein, federal and state regulation had simply not been capable of preventing the antitrust problems that the decree was to resolve. The Department of Justice argued, and introduced extensive evidence to prove, that the local exchanges are so complex, so technologically dynamic, and characterized by such vast joint and common costs that no set of regulations could realistically prevent competitive abuses. It also appeared that when the FCC did act, its efforts were largely unsuccessful.

For example, the trial record shows that, despite FCC orders to do so entered in 1971,[71] in 1978,[72] and in 1974,[73] the Operat-

others. They are not limited to transmission, but in certain contexts include related activities such as interexchange traffic routing, the selection of interexchange carriers through least-cost routing or shared tenant services systems, and the marketing of the services of interexchange carriers. *United States v. Western Electric Co.*, 627 F.Supp. 1090, 1099–1103 (D.D.C.), *aff'd in part and rev'd in part*, 797 F.2d 1082 (D.C.Cir. 1986).

70. Tariffs filed with the FCC became effective at once or within a brief period of time of their filing by the carrier, and they are deemed to have, in effect, the force of law. So many telephone tariffs were and are being filed that the Commission frequently has no time or opportunity to review them in any detail, if at all. Even when they are reviewed and found wanting, the Commission can usually do no more than to suspend them for a brief period. Telephone companies can, and frequently do, file new tariffs just as quickly as old ones are questioned, and the result is that regulatory oversight is in practice often slight.

71. *Specialized Common Carriers Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington*

of this nation in that regard, in that the telecommunications equipment market—like the television and automobile markets today—will increasingly become the preserve of foreign-dominated firms. *See* pp. 561–65, *supra*. The Regional Companies, once again, argue that this is not a matter for judicial concern; yet these same companies have loudly advocated in many forums, including this Court, Bell Atlantic Comments at 5, that the decree stands in the way of an improved American international trade position.[274] The companies' position that the Court may not consider the probable deleterious effect of a restriction removal on American foreign trade is not only bad policy; it is also bad law. *See United States v. United States Steel*, 251 U.S. 417, 457, 40 S.Ct. 293, 301, 64 L.Ed. 343 (1920); *FTC v. Great Lakes Chemical Corp.*, 528 F.Supp. 84, 98 (N.D.Ill.1981); *United States v. LTV Corp.*, 1984-2 Trade Cas. 66,133 (D.D.C.), *appeal dismissed*, 746 F.2d 51 (D.C.Cir.1984).

Fifth. Although the Department of Justice insists that the Court's inquiry must be restricted to competitive injury to the exclusion of all other factors, it does find a cost-benefit standard in section VIII(C) of the decree, when that supports its position. *See, e.g.*, Department of Justice Report at 46. The Court has considered costs versus benefits where this can appropriately be done without undue risk to competitive considerations. *See* Part VIII (information transmission) and Part IX (catch-all restriction) *infra*.

VIII

Transmission of Information Services

Although the Court is denying the requests for removal of the information services restriction insofar as they relate to the provision of information content (Part V, *supra*), a separate analysis is required to determine whether so much of that restriction should be lifted as to enable the Regional Companies to acquire and operate the infrastructure necessary for the transmission of information services generated by others.[275] Before considering the competitive issues raised by that suggestion, it is useful to describe first what such action would mean in practical terms.

A. *Videotex Industry*

The term "videotex" refers to a wide variety of easy-to-use interactive data services. "Videotex arranges information in a text or graphic format on a video display with user input through a keyboard." Huber Report at 1.29 n. 46. Videotex applications cover an entire spectrum of services, ranging from mere database access to such sophisticated services as teleshopping, electronic banking, order entry, and electronic mail. *Id.*

The videotex industry has grown slowly in the United States, particularly with respect to the home videotex market, and consumer-oriented videotex services on a substantial scale remain largely in the future. Several efforts to provide videotex services have failed. In March 1986, Knight-Ridder Newspaper Inc.'s Viewtron service, which provided home subscribers in several markets with news, stock prices, and shopping information, folded without having made a profit. Around the same time, the Times Mirror Company's Gateway videotex services closed down after losing approximately $80 million. *Washington*

274. The Regional Companies' stance is wrong even in that respect. The Court has not denied a single waiver request for international operations. To be sure, the Regional Companies are precluded by section II(D)(2) of the decree from manufacturing telecommunications equipment but, as shown at pp. 560–61, *supra*, American telecommunications manufacturing is stronger today than it was under the monopoly conditions to which the Regional Companies want to return.

275. Among those who have requested such relief are U S West and Videotex Industry Association. Some intervenors argue that the decree even now permits the Regional Companies to transmit information services. However, in view of the breadth of the information services definition in section IV(J) of the decree, and the inclusion therein of such terms as "acquiring," "transforming," "processing," "utilizing," and "making available," that construction must be rejected. Moreover, as will be seen below, the transmission of such services actually involves the performance of a number of services that by any fair reading of the term "information services" would be included in that definition.

In order to facilitate the growth of a "truly competitive telecommunications industry," the Court therefore approved the proposed decree language prohibiting the Regional Companies from entering the interexchange services market [78] as an integral and vital part of the prophylactic remedy represented by the decree. It is that prohibition that is now again before the Court on the basis of requests for its removal.

B. *Original Department of Justice Proposal*

In its Report submitted on February 2, 1987, the Department of Justice, in addition to recommending removal of the restriction on mobile interexchange services (*see* Subpart F, *infra*), advocated that the basic interexchange restriction embodied in section II(D)(1) of the decree be sharply cut back. Instead of being prohibited from engaging in interexchange services, each Regional Company would be authorized to render all such services, with the exception only of those interexchange calls that originated or terminated in an area in which the particular company had a legally protected monopoly. Department of Justice Report at 59, 68–76.[79] The Regional Companies by and large initially supported this approach, albeit with substantial modifications.

However, following its study of the comments its proposal had generated,[80] the Department reversed its field. Its subsequent submissions to the Court concluded both that the Regional Companies retained the ability to use their control of the monopoly bottlenecks to impair interexchange competition, and that the in-region out-of-region proposal itself presented insuperable practical difficulties. Accordingly, the Department withdrew that proposal. Response of the United States at 24–28. The Court agrees with both prongs of the Department's present position.

The bottleneck control issue is discussed at some length in Part II of this Opinion, and no purpose would be served by a detailed reiteration of that discussion here. Suffice it only to say once again that the monopoly bottlenecks continue to exist essentially in unchanged scope and form, and that they continue to provide the same basis for anticompetitive activity as they did prior to the Bell System break-up.[81] It is worthwhile, however, to describe briefly the basis for the Court's conclusion, paralleling that of the Department, that it is not practical to lift part of the interexchange restriction so as to permit each Regional Company to offer interexchange services outside but not inside its own region.

The plain and universally recognized fact is that the market for interexchange services is national. Because of that overriding fact, it is unlikely in the extreme that a Regional Company could compete successfully with other interexchange companies (or even exist in the interexchange market) if, unlike its competitors, it were able to offer service in only parts of the country.[82]

78. The Court also concluded that the Regional Companies would have substantial incentives to subvert the decree's equal access requirements because they would "stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs." *AT & T*, 552 F.Supp. at 188.

79. The Department reasoned that the bottleneck monopoly power could not be effective if the company vested with that power operated only outside its own region, and it further concluded that any concern existing at the time of divestiture that the Regional Companies would operate as a unified group of local exchange monopolies "has proved unfounded." Report at 74. The Department also stated that the opportunities for cross-subsidization would be limited because the likely geographic separation of facilities and personnel would permit detection of any attempts at such cross-subsidization. Report at 76.

80. Of the seventy entities that addressed the Department of Justice proposal, only two supported it completely.

81. As National Telecommunications Network (NTN) correctly states, "[f]or example, if Pacific Telesis were permitted to compete with NTN to sell private lines in the eastern United States, it would have an incentive to give NTN inferior access to points in the Pacific Telesis region, and so damage NTN's reputation in the industry for service reliability and other considerations." Comments at 16.

82. Few, if any, individuals would subscribe to or use U S West, for example, if they could not use that company's long distance service for

See also Department of Justice Report at 166; Response at 9, 99.

The protection of consumers is a foremost objective of the antitrust laws, and their protection was a prime objective of this lawsuit when it was brought and prosecuted by the Department of Justice for a number of years. The Court continues to regard consumer protection as such an objective.[267]

[13] Second. A related issue is that of the relevance of the goal of universal telephone service. There, too, inconsistencies abound. The Department contends that the decree restrictions may not be maintained to further the universal service goal. Response at 13. Yet Ameritech, its ally on these issues, chastizes the Department for proposing conditions respecting only partial removal of the interexchange restriction on the ground, *inter alia*, that this would "interfere with legitimate social objectives, such as universal service." Comments at 56.

Universal service has been explicitly declared by the Congress to be a paramount national objective,[268] and the courts may be expected to avoid taking actions, if that can legitimately be done, that are inconsistent with this objective.

Whatever others may do,[269] the Court will continue to decline to regard divestiture as an end in itself, as a mere deregulatory gesture for the sake of deregulation. Divestiture and the line of business restrictions have as their basic purpose the removal of anticompetitive impediments, to the end that the rates consumers must pay will be reasonable and unimpeded by unfair competition, and that all segments of society, including the poor, the old, the infirm, and those living in isolated rural areas will in consequence have access to necessary telephone service. That is consistent with the basic purposes of the antitrust laws—purposes that the Court expects to continue to respect.

[14] Third. Insofar as, more specifically, the information services restriction is concerned, in addition to the competitive concerns discussed in Part V, *supra*, that stand squarely in the way of a removal of that restriction, and that alone and without more justify its retention, there is also the threat such removal would pose to First Amendment values that would lead to the same result.

It is a purpose of the First Amendment to achieve "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). The diversity principle has been repeatedly recognized by the Supreme Court.[270] Considera-

267. As indicated above, the Court's decisions on the core restrictions do not turn on the factors of protection of ratepayers from price gouging or that of universal service. But there should be no misunderstanding regarding the continuing relevance of congressionally-mandated policies. *See also AT & T*, 552 F.Supp. at 149–51.

268. 47 U.S.C. § 151. The Department of Justice repeatedly contends that its proposed removal of the restrictions would not intrude on the regulatory authority of the states. Report at 102. Yet it is noteworthy that the states are making every effort to keep rates for the consumers low so as to foster universal service, *see, e.g.*, Comments of Washington Utilities and Transportation Commission at 9; Comments of the Public Service Commission of Wisconsin at 2–3; an objective that would be undercut by a removal of the core restrictions. The state commissioners are divided on the question of the removal of the restrictions but not on the issue of universal service.

269. *AT & T*, 552 F.Supp. at 224. The Regional Companies did not utter any complaint that this decree interest in affordable local rates involved the consideration of improper factors, nor have they expressed any adverse reaction to the Court's action since that time. Again, there was no objection from these companies when the Court noted in 1983 that, in taking action favorable to the Regional Companies with respect to such matters as the Bell name and logo and the availability of Bell System patents, it considered, among other factors, the protection of the principle of universal telephone service. *Western Electric Co.*, 569 F.Supp. at 1091, 1120–21. And of course none of the companies is offering to relinquish those benefits.

270. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795, 98 S.Ct. 2096, 2112, 56 L.Ed.2d 697 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *United States v.*

this project—preclude any thought of a duplication of the local networks.

Only when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method—as microwaves and satellites were ultimately found to be feasible for handling long distance traffic—can the Regional Companies' local monopoly be regarded as eroded. Accordingly, waivers of the restriction could not be granted based on an absence of state and local regulation unless these regulatory changes were accompanied by substantial changes in telecommunications technology, the economics of the provision of local telephone service, or both.

Second. As experience has shown, to hold out to the Regional Companies the prospect of piecemeal waivers or similar judicial orders under the imprecise conditions suggested by the Department of Justice would (1) serve to encourage their resistance to the grant of full equal access and (2) cause them to redouble their efforts to nibble incessantly at the edges of the restrictions, in the expectation that this would result in their complete entry into the prohibited markets. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 867–68 (D.D.C.1984); *see also* Reply of Competitive Telecommunications Association at 5–8. In fact, executives of and spokesmen for the various Regional Companies rarely miss an opportunity to explain their desire, nay their right, to operate interexchange networks, and the groundwork for such expansion is laid whenever and wherever possible. *See, e.g.*, statement of Thomas E. Bolger, Chairman of Bell Atlantic, *Washington Post*, December 30, 1985, Business Section at 1. The uncertainty, turmoil, and confusion that would be created in the telecommunications industry by implementation of the Department's recommendation are as undesirable as they are unnecessary.

Third. As stated above, the Court has for some time sought to find means for phasing out or reducing its "oversight" responsibilities consistently with its responsibilities under the decree.[86] Several of the decisions made today are steps in that direction. *See* Parts VIII and IX, *infra*. However, if the Department's recommendations were adopted, the Court would become involved in detailed regulation of the Regional Companies with a vengeance.

The Court would be constantly reviewing requests for removal of interexchange and information services restrictions on a state-by-state, possibly county-by-county, basis, in order to determine whether local regulation had changed sufficiently to allow such removals in the particular area. In order to carry out that responsibility, the Court would have to review and to scrutinize, on an ongoing and unending basis, the effect, and possibly the purpose, of old and new state and local regulation of telecommunications providers all over the United States.[87] It is difficult to imagine a more systematic and offensive intrusion into local affairs, and on this basis, one intervenor aptly describes the Department of Justice proposal as "an affront to federalism." CP National Corporation Comments at 6.

The task prescribed by the Department of Justice is one that a federal court should undertake, if at all, only if that is absolutely essental for the protection of federal constitutional or other legal rights. Clearly, that is not the situation here, and the Court accordingly declines to enter that thicket.

For these reasons, the Court will not entertain applications for waivers that are predicated only upon changes in state or

86. *See, e.g., Western Electric Co.*, 592 F.Supp. at 873–75 (establishing procedure whereby Department of Justice reviews requests for waivers of line of business restrictions).

87. One example is cited by the Utilities and Transportation Commission of the State of Washington which points out that it has permitted local resale and shared tenant services but not the provision of basic local service by more than one telephone company in the same territory, adding, "[i]s the Department suggesting that the Court interpret state law to determine whether the Washington situation is a legally protected monopoly?" Comments at 16.

subsidization would also take place with respect to these new markets, and that it would occur on a far wider and more destructive scale than heretofore. That is so if only because cross-subsidies are much more easily concealed where—as between local exchange service and interexchange, telecommunications manufacturing, and information services—there are many common costs that can be attributed, almost at the companies' unfettered choice, to any of the various activities, than where cross-subsidization is attempted between exchange service and ventures foreign to telecommunications (*see* Part IX, *infra*).

One likely consequence, then, of Regional Company entry into the interexchange, manufacturing, and information services markets would be to give these companies the ability to undersell their rivals in these markets because they would have at their disposal an ever-repleneshing fund with which to subsidize their competitive operations—the monies contributed pursuant to regulatory compulsion by the nation's local ratepayers.[262] The decree was, of course, aimed in significant part at the avoidance in the future of such practices.

B. *Other Public Policies*

A number of well-defined public policies were considered by the Court when it approved the proposed consent decree. As the Court then stated, while the issues of competition and the effects of competition or obstances to free and fair competition are "at the heart of the antitrust laws," and must therefore be deemed matters of paramount concern with respect to the decree, *AT & T*, 552 F.Supp. at 150, "when choosing between effective remedies, a court should impose the relief that impinges least upon other public policies." *Id.* at 150–51. As elaborated on below, the Court took account at that time of such interests as ratepayer protection, the congressional mandate of universal service, and the First Amendment, among others, *AT & T*, 552 F.Supp. at 183–88, and so did the Department of Justice. *See, e.g.*, Competitive Impact Statement, February 10, 1982, at 47.

Entities such as AT & T and MCI now argue for consideration of the same types of factors as were considered before, AT & T Comments at 63; MCI Comments at 92–95, while the Department of Justice and the Regional Companies contend that the Court is precluded from doing so. *See infra*. As indicated in Part II, *supra*, the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place.[263] The positions of the Department and the Regional Companies with respect to the consideration of such factors are not only at odds with that test, they are also inconsistent with the views these entities have expressed in the past and some that they are expressing even now.

262. It is relatively easy, at least in some states, for the large and powerful Regional Companies to secure rate increases from the relatively small, understaffed local regulators who, moreover, are confined jurisdictionally to substantially smaller geographic areas. *See* note 198, *supra*.

According to the Ohio Office of Consumers' Counsel, Bell of Pennsylvania offered $100 million for state economic development in exchange for deregulation legislation. Reply at 13. A recent comprehensive report of the operations of NYNEX complains about the inability of regulators over the opposition of NYNEX to secure financial data, to halt the diversion of economies achieved by the regulated segment to the benefit of non-regulated operations, and similar problems. New York State Department of Public Service, *Report on NYNEX Corporation and Affiliates* (March 1987). And the trade press reported recently that U S West informed state regulators in its area that the location of its planned research laboratory would depend upon the fate of deregulation legislation or upon requested rate increases, a charge that U S West has denied. *Communications Week*, August 3, 1987, at 1.

263. CyberTel Corporation suggests, with some justification, that removal of restrictions should appropriately encompass the Tunney Act public interest standard that governed approval of the decree and that was responsible for the inclusion of the very section VIII(C) at issue here. Comments at 4. *Cf. FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 1003, 97 L.Ed. 1470 (1953). Unless this is done, the imposition of restrictions and their removal may be governed by disparate tests—a situation that could result in severe logical and practical difficulties.

ence of the seven Regional Companies in lieu of the one Bell System; (3) "substantial implementation" of equal access;[91] (4) the GTE analogy; and (5) the possibility of new antitrust suits.

The issue of regulation, which is common to the disputes involving all three of the core restrictions, is discussed with respect to all of them in Part VI, *infra*. As for the remainder, some of the claimed developments have not, in fact, occurred, and others have not had an effect on the interexchange services market.

1. *Division of Bell System Into Seven Companies*

Much is made by the Regional Companies of the circumstance that they are seven while the Bell System was only one. The difficulty with the arguments advanced based upon that undoubted fact is that the independence of the Regional Companies from the Bell System does not constitute a new development; it was mandated in the very same decree that also mandated the interexchange restriction. The decree, in fact, assumed the necessity for that restriction notwithstanding the breakup of the Bell System into seven or more new entities.[92]

During the proceedings that led to the approval and entry of the decree, the Bell System advised the Court that its evaluation of the decree could and should be premised on the existence of seven Regional Companies,[93] and the Court did just that.[94] The record shows without the slightest ambiguity that the consequences that were to flow from the divestiture and the restrictions were identified and taken into account in 1982 with respect to the post-divestiture Regional Companies, not merely the pre-divestiture Bell System.

That was so because the crux of the problem prior to the divestiture was not so much the size of the Bell System (although that played a part) but its control of the local exchange bottlenecks. Now that the control of these bottlenecks has shifted to seven regional entities, they must necessarily be limited as was the Bell System to prevent their exploitation of these bottlenecks, absent some substantive change. And, as discussed in detail above, there has been no substantive change: the bottlenecks are as pervasive as ever. It is undoubtedly for these reasons that the Department of Justice, too, recognizes that "the fact of divestiture itself" is not "a sufficient changed circumstance" to justify a modification of the restrictions. Reply at 57.[95]

The Regional Companies further argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the six others.[96] Again, the possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions upon the several successors of the Bell System. Beyond that, as discussed in Part VI, *infra*, the Regional Companies are free, by virtue of the regulations proposed by the FCC, to adopt entirely dissimilar accounting and other procedures, making impossible intelligent

91. *See also* Department of Justice Report at 68–70.

92. Under the decree the restriction would have applied even if the Bell System had been divided into twenty-three independent entities (AT & T and the twenty-two Operating Companies). The combination of the Operating Companies under the aegis of seven holding companies thus constituted less of a dilution of centralization than the decree allowed.

93. AT & T Reply Comment dated May 21, 1982, at 4–5.

94. *AT & T*, 552 F.Supp. at 142 n. 41, 201, 214 n. 346.

95. The Regional Companies are far from being of a size that can easily be regulated or whose operations can be otherwise be scrutinized without difficulty. The smallest would rank in the Fortune 20 in terms of assets and the Fortune 50 in terms of sales. Comments of Dun and Bradstreet at 40–41. Moreover, their complex organizational structures compared to that of the Bell System further complicates any effective scrutiny of their activities to determine whether they are consistent with the decree. *See* sections V and VI of the decree.

96. *See, e.g.*, Ameritech Reply at 3–7.

tee of the National Association of Regulatory Utility Commissioners (NARUC), issued a report based upon audits of five Regional Companies—Bell Atlantic, BellSouth, U S West, Ameritech, and Pacific Telesis. The committee found that (1) during the audit process, the Regional Companies consistently attempted to block access to accounting and cost allocation records; (2) the information provided was frequently of poor quality; (3) the audit revealed that customers of several Regional Companies had improperly been forced to subsidize the activities of competitive subsidiaries of these companies; (4) valuable lines of service (*e.g.*, Yellow Pages) were transferred from the telephone companies to unregulated subsidiaries;[252] and (5) the Regional Companies tended to transfer virtually all telephone income to the parent Regional Companies, with minimum infusions of equity from these companies to the telephone subsidiaries.[253] Comments of Washington Utilities and Transportation Commission at 3–5, citing "Summary Report on the Regional Holding Company Investigations," National Association of Regulatory Utility Commissioners, Washington, D.C., September 18, 1986. Similar findings were reported by the staff of the California Public Utilities Commission with respect to Pacific Telesis.[254]

Further, in actions that likewise remind the Court of much of the evidence adduced during the trial regarding the Bell System's manouvers toward competitors' requests, Bell Atlantic claims that it is technically impossible to provide equal access for mobile calls originating and terminating in the Washington/Baltimore area (Opposition to Conditions at 11–12); BellSouth says that it cannot do so for calls terminating at a mobile phone in certain cellular service areas (Response at 9); and according to complaints filed with the Department of Justice, Bell Atlantic, NYNEX, and Southwestern Bell have all refused to furnish to interexchange carriers access to information, such as the mobile service customers' names, that is a necessary prerequisite to the marketing of the carriers' services. Dun & Bradstreet Corporation Comments at 34–37; Phonequest, Inc. Comments at 15; ALC Communications Corporation Comments at 29–30; Huber Report at 3.30 & n. 105.[255]

A number of other allegedly anticompetitive acts of Regional Companies have been brought to the attention of the Court, the Department of Justice, the FCC, or the public by various segments of the telecommunications industry. *See, e.g.*, pp. 566–67, and note 101, *supra*. These individual complaints will no doubt be resolved in due course, and in any event, no purpose would be served by a catalogue here. Such a listing would be bound to leave out some meritorious claims, and it is equally probable that it would include others that will ultimately be determined to be unfounded. It may be useful, however, to examine the recent performance of the Regional Companies from a somewhat broader perspective.

2. *Statistical Analysis*

Following the divestiture, the telephone Operating Companies controlled by the Regional Companies requested and were awarded large rate increases almost every-

252. The lack of restraint practiced by some Regional Companies is illustrated by those actions. The Court required an amendment of the proposed consent decree to provide for the transfer of the Yellow Pages to the Regional Companies, in significant part as a means for subsidizing local telephone rates. *AT & T*, 552 F.Supp. at 194. Notwithstanding that history, Yellow Pages profits now frequently go elsewhere (although it appears that, in some instances, transfers of the directory businesses to non-telephone affiliates were halted after state-initiated court battles).

253. No procedures are prescribed, or even under consideration, by the FCC for identifying the cost of the access services that the Regional Companies would have to provide to themselves in furnishing interexchange services. Such a task would appear to be immense.

254. California Public Utilities Commission, *A Report on Pacific Bell's Affiliated/Subsidiary Companies*, Proceeding No. A.85-01-034, Exec. Summary at 2–3 (June 3, 1986).

255. The Department of Justice has declined to take action, but the Court is considering the matter. *See* Order of May 19, 1987, ordering the Department to file a report.

3. *The GTE Analogy*

Several Regional Companies[102] argue that, inasmuch as the Court approved the antitrust consent decree involving GTE, which does not include line of business restrictions similar to those in the instant decree, consistency requires the removal of the restrictions here. There is no merit to that contention.

[7] In the first place, it cannot reasonably be argued that the adoption of the GTE decree constitutes a change in terms of the section VIII(C) standard of the decree in the instant case. To put it another way, the Regional Companies lack standing to seek a modification of this decree merely because the Department of Justice agreed to a consent decree in another antitrust suit with an entirely different defendant, and the Court approved that decree. The Department of Justice was surely not required under law to insist upon parity in the *GTE* case with the remedy adopted in the *AT & T* case.[103] As for the Court, it was obliged to give, and it did give, considerable deference to the parties and the agreement they had reached when it, in turn, passed on the GTE consent decree. *AT & T*, 552 F.Supp. at 151.[104]

Furthermore, when the Court approved the GTE decree in December 1984, it carefully considered the similarities and differences between the Regional Companies and GTE, and it concluded, agreeing with the Department of Justice, that different treatment was justified, for the following reasons:

> To be sure, in some significant respects, particularly size and scope of operations, GTE more or less matches the Bell Regional Holding Companies (at least the smaller ones). In other ways, however, the two types of entities differ to some substantial degree.
>
> Each of the Bell regional companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered. Moreover, the Regional Holding Companies also have the facilities to provide all the intercity and inter-LATA traffic throughout their regions, while the GTE Operating Companies control little by way of intercity facilities, and what facilities they do have are by and large of the entrance type which do not cover the areas in which the companies operate. (Transcript of Hearing at 40–41). Finally, internal planning documents of GTE and Sprint indicate that Sprint's interexchange network will, even by 1985 or 1986, reach only sixteen GTE cities (Transcript of Hearing at 42), and the Department of Justice has observed that of all access lines in existence, only one or two per cent are in GTE cities, and that Sprint has the fewest of these. (Transcript of Hearing at 41). All these factors suggest that entry by other interexchange carriers into the local markets dominated by GTE is far less likely and the anticompetitive effects of improper GTE actions will be both less probable and more easily detectable (footnotes omitted).

United States v. GTE Corp., 603 F.Supp. 730, 737 (D.D.C.1984). Nothing of significance has occurred since the GTE decree was entered to alter that assessment.

It is also worth noting that, when counsel for the Department of Justice appeared before the Court to defend the GTE settlement, he advised the Court that, should the Court believe that approval of that settlement might in any way cast doubt upon the appropriateness of the restrictions in the Bell System decree, the Department would prefer that the Court disapprove the GTE consent decree rather than to cast any shadow on the Bell System decree, particu-

102. *See, e.g.*, Southwestern Bell Comments at 25–27; U S West Comments at 39–40.

103. The fact that one of the seven Regional Companies may or may not be more dispersed than GTE was at the time of the consent decree, *see* U S West Reply at 23 and supplemental Appendix 6, is therefore irrelevant.

104. As indicated above, the decree in the Bell System case basically rests upon the twin pillars of (1) the divestiture of the Operating Companies from AT & T, and (2) the line of business restrictions on the divested companies. The GTE decree involves a different structure and different remedies.

Data communications equipment requires careful attention to and coordination with all the parameters of the transmission facilities with which it is to be used, because such equipment is operable only if the equipment at the customer's premises mirrors that at the exchange carrier's serving offices—the standard for one dictates the standard for the other. Thus, any disparity in access to information about the characteristics of existing, changed, or new transmission services can result in substantial differences in equipment design, characteristics, and costs. Since the FCC regulations do not require the disclosure of network requirements, their effect is likely to be to leave independent manufacturers hopelessly behind.

The FCC has also issued regulations that are claimed to prevent a Regional Company from obtaining an unfair head start over CPE rivals. These regulations would in theory prevent a Regional Company from using its local exchange status to utilize customer proprietary information unavailable to rivals in a dependent competitive market. 47 C.F.R. § 64.702(d)(3) (1986); BOC Structural Relief Order at ¶ 70. *See* Department of Justice Report at 164–65; Response at 113. However, that regulation, too, contains at least one very large loophole.

The regulation addresses only the use of customer proprietary network information for CPE marketing; it is not concerned with CPE manufacturing even though manufacturing information could and no doubt would also be used to gain advantage in that market. It is generally understood that it is highly important for anyone attempting to decide what new products to develop to have access to information regarding customers' network configurations, traffic patterns, and current equipment capabilities. The Department of Justice, for one, recognizes this defect but overcomes it by "presuming" that the FCC "would impose customer information rules that would prevent a BOC from discriminating...." Report at 187–88 n. 379. This speculation is an insufficient foundation upon which to base the removal of a restriction that effectively and *presently* reduces the possibilities of discrimination.[246]

In sum, the regulations relied upon by the Regional Companies and the Department of Justice to curb discrimination by the Regional Companies against their putative competitors in the markets they seek to enter are entirely inadequate: they either predate the decree and were found at the trial to be ineffective; they are not sufficiently comprehensive; they contain large loopholes; or they are a long way from being promulgated, let alone being implemented.

VII

Regional Company Activities and Public Policies

In addition to the factors discussed in the preceding sections of this Opinion upon which the Court's decision denying the motions for removal of the core restrictions is based, there are several other considerations much mooted by the parties and intervenors. Since these considerations are argued at some length by parties and intervenors, and since the Court also refers to them at times, they are discussed herein, albeit not at great length or detail. How-

246. The FCC regulation also permits Regional Company CPE personnel to have access to the CPNI of only those multiline business customers that have provided the Regional Companies with written authorization for such access; such information will be available to competing CPE vendors only if the customer takes affirmative action to permit them to have access. BOC Structural Relief Order at ¶ 70. Even though some CPE users may be sufficiently alert to seek competing bids from both Regional Company and non-Regional Company CPE vendors, the phenomenon of inertia and the inherent limitations on the dissemination of information will probably create an additional inequality between CPE vendors affiliated with a Regional Company and those that are not. IDCMA Comments at 39; *cf.* Department of Justice Response at 114; FCC Comments at 18. As Dr. Huber concedes, the effectiveness of these regulations will in practice will be difficult to ascertain. Huber Report at 16.22. *Accord* CBEMA Comments at 17–27; Consumer Federation of America Comments at 5–16; ICA Comments at 5–6; MCI Comments at 54–62; NASUCA Comments at 8–24; Tandy Comments at 28–29; USTSA Comments at 46–49; Washington PSC Comments at 23–24.

The Department's analysis appears to be correct, at least as of now,[111] but that alone does not resolve the issue before the Court. On a purely literal level, interexchange cellular radio is an interexchange service as defined in section II(D)(1) of the decree. As such, it is of course prohibited to the Regional Companies absent developments that would cause the Court to find that, contrary to cellular radio's status at the time of the entry of the decree, its dynamics have changed to the point that there is no longer a substantial possibility that it could be used to impede competition. It cannot reasonably be claimed that such new developments have taken place.

More substantively, the entry of the Regional Companies into the cellular business without individualized scrutiny[112] would raise precisely the same concern that led to the adoption of the interexchange restriction in the first place: the possibility of discrimination against interexchange competitors in the provision of the access needed to reach the cellular customers.[113] A number of developments contribute to the conclusion that such discrimination is not only possible but probable.

In the first place, several of the Regional Companies are not even willing to accede to the minimal Department of Justice recommendation that, should they be allowed into the interexchange market, they grant complete equal access to competing interexchange carriers, included in the intra-LATA portion of the cellular systems.[114]

Moreover, without even having been in the interexchange cellular business across the board, the Regional Companies appear to have engaged in acts of discrimination against other mobile services providers—activities that do not inspire confidence that, should the companies be permitted to enter the cellular market without limitation, they would treat competitors in an even-handed manner. According to the Huber Report itself—upon which the Department of Justice otherwise heavily relies—the Regional Companies have used their control over the local bottlenecks in a variety of ways to impede competition by providers of mobile service. Some of these anticompetitive activities are catalogued at pp. 580–81, *infra*.

There is also the broader concern that, should the motions be granted, a Regional Company could evade the basic interexchange services restriction itself by the simple expedient of constructing a connection between its mobile telecommunications switching offices and any of their standard end offices, thus providing long distance service throughout the country through a combination of cellular and standard interexchange facilities.

Several of the Regional Companies, *see, e.g.*, U S West Memorandum at 159–60 & n. 171, rely on the grant by the Court of several waivers on a case-by-case basis with respect to interexchange cellular services, contending that such waivers established the principle that the test of section VIII(C) has been satisfied. Not only is that contention entirely erroneous, but it exemplifies the attempts made from time to time by Regional Companies to take advantage of extremely limited precedents as bases for broad departures from the requirements of the decree.

Whenever the Court has granted waivers, it was essentially in the context of representations that highways and automobile traffic patterns (typically in large met-

111. There are indications that the cost and the price of cellular radio are falling, and that in the future it may become competitive with landline interexchange services.

112. Such scrutiny is now provided by the waiver request mechanism.

113. For that reason, the Department of Justice in 1983 took precisely the opposite position to that which it is taking now. Memorandum of the United States of May 19, 1983, at 18, although cellular radio then, even more than now, served a separate market.

114. In response to the Department of Justice's equal access recommendation, one Regional Company observed that there was no "sound reason why Bell Atlantic should be required to provide equal access to inter-LATA calls completed within an area served by the same cellular switch." Bell Atlantic's Opposition to Conditions Specified in the Department's proposed Order, at 11.

on it as ensuring, in the words of section VIII(C) of the decree, that there is no substantial possibility that the Regional Companies could use their monopoly power to impede competition.[234]

3. *ONA Suffers From Significant Defects*

Additionally, here again, even if these regulations were fully in force and effect, they would not be likely to have a decisive impact, for several defects in such standards as have been announced are already apparent.

First, as several intervenors[235] note, ONA will apply only to digital switches—switches that serve only one-fourth of all access lines available. Second, ONA will not assure equal access or equal cost since it will not require the Regional Companies to provide colocation of competitors' enhanced services within the Regional Companies' central offices.[236] Third, the Regional Companies will have no incentive to provide equal access for rival enhanced service providers, for with respect to these potential competitors, the Regional Companies will not be disinterested parties if the restriction is lifted. Fourth, ONA, as it stands now, will not address problems that will arise with new technical developments, but it applies only to conditions that pertain to current technology and those that are plainly anticipated now.[237] Fifth, the only Regional Company to have filed its CEI plan as of May 1987—Bell Atlantic—has submitted what may be a flawed product, for it eliminates outside plant and transport costs for its own service, while charging standard tariffs for competitors' access. Reply of Consumer Federation of America at 7.[238]

4. *Other Standards*

The Regional Companies and those who support their requests also place some faith in national and international standards for interconnection.[239] But not only is it not at all clear that across-the-board, uniform national standards even exist,[240] but what standards there are have in part been established by private organizations, some of them dominated by the Regional Companies themselves.[241] Furthermore,

234. The Centralized Operations Groups (COGs), which process, coordinate, and schedule orders for CPE interconnection, are also claimed to reduce the possibility of discrimination, particularly with respect to installation, repair and maintenance of CPE. Department of Justice Report at 164. COGs are not, however, the exclusive means by which CPE vendors place their orders. For example, a Regional Company's own CPE vendor does not have to place its orders through this mechanism. BOC Structural Relief Order at ¶¶ 82–83. The COGs were developed primarily for orders placed by PBX and key system vendors and have rarely been used for orders placed by data communications equipment vendors. It is not clear whether a Regional Company manufacturing CPE would have to place orders for interconnection of its own CPE through the COGs. Furthermore, the COGs are not required to handle maintenance. BOC Structural Relief Order at ¶¶ 82–83.

235. *E.g.*, Compuserve Comments at 31; MCI Response at 56.

236. Comments of Consumer Federation of America at 15; U S Sprint at 30; IDCMA at 53–54.

237. While the Regional Companies' ONA plans must allow all competitors to obtain "unbundled and equal" access to "basic service functions," *see* Department of Justice Report at 141, the Regional Companies retain control over the degree of unbundling, the development of new basic service functions, and the price for access to these functions. Thus, whenever a competitor's product or service will require novel and specialized access requirements, the Regional Companies' will have a further opportunity to discriminate in the form of access.

238. As for the CEI requirements, they provide very little protection against discrimination because there are numerous possible interpretations of CEI, MCI Comments at 55 n. 161, and because a Regional Company need not provide CEI until it decides to offer an enhanced service. United Telecommunications Comments at 21–22. The *Computer III* rules require that a Regional Company seeking to provide a particular enhanced service on an unseparated basis first obtain FCC approval of a plan providing CEI for other enhanced service providers. *Computer III* ¶ 190. 104 F.C.C 2d at 1054–55.

239. *See, e.g.*, Department of Justice Report at 164.

240. *Compare* Department of Justice Report at 196 *with* IDCMA Comments at 42 n. 101.

241. For example, the T-1 Committee, administered by the Exchange Carriers Standards Organization, is said to be dominated by the Region-

gaged in three general types of anticompetitive conduct with regard to the telecommunications equipment and CPE markets.

First. As testimony and other evidence demonstrated, the Operating Companies managed, by one strategem or other, to purchase Western Electric's products, even when those products were more expensive or of lesser quality than alternative goods available from unaffiliated vendors.[122]

Second. The Operating Companies and Bell Laboratories (the Bell System's central research and engineering affiliate)[123] engaged in discrimination in the dissemination of information and design by granting Western Electric premature and otherwise preferential access to necessary technical data, compatibility standards, and other information about the Operating Companies' needs and requirements and the evolving characteristics of the local exchange. The delays encountered in these respects by Western Electric's competitors frequently made it difficult, if not impossible, for them to compete for Operating Company business: Western Electric was ready with the products when they were needed, and the competitors were ready several months later. The not unexpected result was a further skewing of procurement toward the Bell System's manufacturing arm and away from independents.

Third. The Bell System subsidized the prices of its equipment with the revenues from the Operating Companies' monopoly services.[124] The effect of this practice, as with respect to cross-subsidization generally, was (1) to permit the Bell System to undercut other producers of equipment (which lacked such a subsidy), and (2) unfairly to burden the consumers with exces-

122. More specifically, the Court found, commenting on the government's evidence of anticompetitive conduct:

> This evidence tended to show that the general trade manufacturers encountered a considerable number of obstacles in trying to design equipment for, and to sell this equipment to, the Bell Operating Companies, and that these obstacles perpetuated a buy—Western bias. For example, the competitors had difficulty in locating the employee in Western or the Operating Companies authorized to negotiate a sale; in obtaining from Bell compatibility specifications (without which general trade products could not be designed for interconnection with the Bell network); and in persuading Bell Labs to complete objective evaluations (which were usually required before sales could be effected). The government's evidence further indicated that Bell did not authorize the purchase of the general trade equipment even if no Bell product of equivalent quality, cost, or technical sophistication was available; instead, crash programs were initiated to develop competing Western products (to the extent that, in one instance, Western literally copied the general trade product so that it did not need to wait for the design and development of its own model). Operating Company employees were under pressure from AT & T officials to buy from Western (even when a general trade product was cheaper or of better quality) or to wait until a Western product comparable to the desired general trade equipment was available, and they were required to provide detailed justifications for general trade purchases which were not necessary for the purchase of Western equipment.
>
> The evidence supporting the seventeenth episode, the "umbrella" package, shows that, despite a stated policy to the effect that the Operating Companies were to buy the best quality equipment at the lowest price regardless of source, the structural relationship among the various components of the Bell System generated a pro-Western, or in-house bias in the Operating Companies' purchasing practices (footnotes omitted).

AT & T, 524 F.Supp. at 1371–72.

123. Bell Laboratories is a scientific facility that has often been said to be without parallel anywhere in the quality of its scientific achievement.

124. The Court described this process in its 1981 Opinion as follows:

> ... [the government's] experts have testified that a combination of vertical integration and rate-of-return regulation has tended to generate decisions by the Operating Companies to purchase equipment produced by Western that is more expensive or of lesser quality than that manufactured by the general trade. The Operating Companies have taken these actions, it is said, because the existence of rate of return regulation removed from them the burden of such additional expense, for the extra cost could simply be absorbed into the rate base or expenses, allowing extra profits from the higher prices to flow upstream to Western rather than to its non-Bell competition. *See Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir.1979); *Six Twenty-Nine Productions v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir.1966); 3 Areeda & Turner, *supra*, ¶ 726, p. 218 (footnote omitted).

AT & T, 524 F.Supp. at 1373.

> logical conditions, regulators would have to have sufficient foresight to determine in advance the discriminatory potential inherent in tomorrow's technology ... Even if it were possible, moreover, effectively to monitor the technical aspects of interconnection in an evolving technological environment, there would remain still more subtle means of discrimination in operational activities, such as the timely provision, maintenance, testing and restoration of facilities. In short, the BOCs, if permitted to engage in competitive activities, would have substantial ability to frustrate regulatory attempts to prevent discriminatory conduct.

Response to Public Comments at 58.

The Department of Justice now asserts that the FCC regulations that provide the requirements for the connection of terminal equipment to the local network, the so-called Part 68,[220] limit the risk of interconnection discrimination. *See, e.g.*, Department of Justice Report at 187–88 n. 379, 163–64.

Reliance by the Department on Part 68 is truly ironic: these regulations were adopted in 1975, 1976, and 1977; they had become fully operational long before divestiture; and, most notably, they were the subject of much testimony and argument adduced by the Department during the trial of this case, all of it designed to demonstrate that they were ineffective. In 1982, the Department noted that "the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are *otherwise insoluble.*" Response of the United States to Public Comments (May 20, 1982). Even if the technical aspects of interconnection were susceptible to regulatory monitoring, "there would remain still more subtle means of discrimination in operational activities such as timely provision maintenance, testing, and restoration of facilities." *Id.* The trial evidence did, in fact, demonstrate the FCC's lack of success in the enforcement of these regulations,[221] and neither the Department nor any Regional Company has pointed to any developments indicating that these enforcement problems could be or have now been overcome.[222]

2. *Regulations Not Yet Adopted*

The proponents of a removal of the restrictions contend with somewhat more confidence that the FCC's *Computer III* decision[223] would impede the Regional Companies' ability to discriminate with respect to interconnection. That decision permits the Regional Companies to provide enhanced services, *i.e.*, generally speaking, information services[224] without the structural separation that was required by the earlier *Computer II* decision, provided that those entities comply with newly developed Comparably Efficient Interconnection (CEI)[225] and Open Network Architecture

220. 47 C.F.R. § 68 (1986).

221. The Department of Justice observes with wry understatement that the "regulations predated the [decree], but the FCC initially had difficulty enforcing them against AT & T." Report at 164 n. 323.

222. Even if these regulations had now, somehow, become more effective, it would not advance the arguments of its proponents by very much. Part 68 does not apply to many services, including analog private lines (to which approximately seventy-five percent of all high-speed business modems are connected), new digital service, and new data-over-voice services, and it also fails to prescribe the standards necessary to ensure that CPE will effectively operate in conjunction with the transmission service to which it is connected.

223. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, F.C.C. 86-252 (released June 16, 1986) (*Computer III*).

224. Nothing comparable to the *Computer III* rulemaking has been undertaken regarding equipment procurement. Dr. Huber and the Department of Justice accordingly agree that "the discretion afforded management in purchasing decisions by regulators is quite broad." Huber Report at 14.13, 14.17.

225. CEI requires the Regional Companies to offer to enhanced service providers, with some exceptions, the same interconnection features on an unbundled basis and at the same price, as are enjoyed by these companies for their own equivalent services. *Computer III*, 104 F.C.C.2d at 1039–43, 1046–53.

manufacturers would once again be disadvantaged and "the development of a competitive market would be frustrated." *Id.*

B. *Anticompetitive Activity is Probable*

In view of that relatively recent history, the question before the Court is whether a removal of the restriction is justified under section VIII(C) or whether such a removal would present a substantial risk that conditions of anticompetitive activity, concentration of the telecommunications equipment market in a few hands, monopolistic pricing, and a relatively sluggish pace of innovation, will return.

As will be seen *infra*, the short answer to the question about a renewal of anticompetitive activity here, as with respect to the interexchange restriction, is that no changes have occurred in the last three years that would warrant removal of the restriction on manufacturing: (1) the Regional Companies still have an ironclad hold on the local exchanges; (2) collectively they account for the purchases of what may be estimated at seventy percent of the national output of telecommunications equipment, only slightly less than the share of the pre-divestiture Bell System; (3) if the restriction were lifted, the Regional Companies may be expected to act as did the Bell System: they would buy all, or almost all of, of their equipment requirements from their own manufacturing units rather than from outsiders; (4) no measures, regulatory or otherwise, are available effectively to counteract such activities; and (5) in short order following removal of the restriction, a return to the monopolistic, anticompetitive character of the telecommunications equipment market would be likely, if not inevitable. The Court will now elaborate on several of these conclusions.[129]

The Department of Justice claims that technological and market changes, in addition to the existence of improved federal regulation, have rendered the manufacturing restriction unnecessary,[130] and in this assessment it is of course supported by the Regional Companies.[131] These changes, it is said, eliminate any substantial risk that the Regional Companies could use their monopoly power in the various telecommunications equipment or CPE markets.[132] That analysis is riddled with serious flaws.

First. The Department and the Regional Companies rely in substantial part on "the continued dispersal of equipment consumption, and the steady consolidation of equipment production," *e.g.*, Department of Justice Report at 161, stemming from the creation of the seven Regional Companies. On this basis, they claim that, because each company accounts for no more than a relatively small percentage of the purchases in any particular market, the purchasing decisions of one or several Regional Companies cannot have much impact on competition in the equipment market as a whole.

As explained above, on the most basic and literal level the existence of the seven Regional Companies is not a new development not contemplated when the decree was entered. Those who drafted, submitted, and approved the decree included the restriction on manufacturing at the same time as they provided, in the same decree, for the break-up of the Bell System into as many as twenty-two or as few as seven local units and hence into the corre-

others, the Court required modification of the proposed decree to permit the Regional Companies to provide CPE. Section VIII(A).

129. One of the issues, the impact of regulation, if any, is discussed in Part VI, *infra*.

130. Department of Justice Report at 161–71.

131. *See, e.g.*, Ameritech Comments at 7–10, 32–41; U S West Comments at 32–34; Bell South Comments at 19–24; Southwestern Bell Comments at 54–60. The FCC, too, supports the removal of the manufacturing restriction, as it does with respect to all the other restrictions, and as it did from the day they were entered as part of the judgment in this case. However, as will be seen below, another government agency, the NTIA of the Department of Commerce, expresses serious doubts on that score.

132. The Regional Companies have made no effort to show that any particular market to which they refer is a "relevant market or submarket" for purposes of antitrust analysis or that they do not possess market power therein. *See Standard Oil Co. v. United States*, 337 U.S. 293, 299–300 n. 5, 69 S.Ct. 1051, 1055 n. 5, 93 L.Ed. 1371 (1949).

As presently drafted, the order would require each of the Regional Companies to adopt a cost manual in accordance with cost allocation standards,[210] and there would be rules for transactions with affiliates said to be designed to protect against cross-subsidization.[211] The Regional Companies had until September 1, 1987 to file their proposed cost allocation manuals. These manuals will hereafter each be subject to public comment and subsequently to review by the FCC for final approval. Based on normal regulatory schedules, some substantial period of time will elapse before this process is completed, and implementation of such manuals as are approved will obviously take some additional time. Finally, there is the delay inherent in petitions for reconsideration, *see* p. 574, *infra*, and the ever-present likelihood of requests for judicial review.

The problems with the *Joint Cost* order do not end with the timing of its issuance in final form; they also relate to substance. As stated above, and as experience has amply shown, cross-subsidization is easy to achieve by firms engaged in both regulated and unregulated business but difficult to detect and to remedy. If regulations are to have any hope of success, they must facilitate such detection to the maximum extent possible. The *Joint Cost* order is not likely to accomplish this objective. To the contrary, it complicates the process of detection by allowing each Regional Company (1) to adopt a manual different from the others; (2) to choose its own cost allocation procedures, (3) to select its own accountants to review and certify the manual,[212] and (4) to use its own reporting categories and terminology.[213] In short, there will be no common denominator. Additionally, the rules will apply only to interstate services, while much of the Regional Company business, mixed and interrelated though it is, is technically intrastate in nature.[214]

The Commission had its own good reasons for adopting this particular system,[215] and the choice of regulatory means is obviously a matter for decision by that body, not this Court. But the issue before the Court is whether changes have occurred since 1984 to render obsolete the line of business restrictions of the decree. To pass on that issue, the Court must necessarily consider the efficacy of the regulations that have been suggested as one such significant change. It is difficult to escape

210. These standards are based upon a fully distributed costing methodology, with emphasis on direct assignment of costs based on causation to the maximum extent possible.

211. The affiliate transaction rules would generally require that transactions between the Regional Companies and their affiliates be recorded on the books at market price at such price can be determined from a price list or tariff. In the absence of a list or tariff price, assets transferred from a Regional Company to its nonregulated affiliate are to be recorded at the higher of netbook cost or fair market value, while assets transferred from the nonregulated affiliate to the Regional Company are to be recorded at the lower of these two figures. Services for which there exists no list or tariff price are to be valued in accordance with the cost allocation standards.

212. As one intervenor correctly points out, much of the application of the FCC's rules to the billions of dollars in expenses and investment is a matter of policy rather than pure accounting, and certificates by the Regional Companies' own auditors therefore cannot serve as an effective check. Western Union Telegraph Company Comments at 3.

213. All these differences and potential inconsistencies dash any hope of achieving the kind of "benchmark" comparisons which, it is argued by some (*e.g.*, Ameritech Comments at 8–12; NYNEX Comments at 8–9; U S West Comments at 36–37) will make anticompetitive actions easier to detect.

214. *See* U.S. Sprint Comments at 30. Accurate auditing is further complicated by the fact that the Commission declined to require reporting at relatively precise intervals; that it authorized the allocation to regulated accounts of "incidental" expenses for up to one percent of a Regional Company's entire revenues (or approximately $100 million per year); and that it required the companies to keep their records for only one year. FCC Joint Accounting Order at ¶¶ 182, 185, 77, 186.

215. As the Commission stated (*Joint Cost Decision*, FCC 86-564 at ¶ 120 n. 225:

> We did not propose to prescribe a manual because we believed that the mix of nonregulated activities and the organizational structure would vary widely from carrier to carrier, and that a single manual would not adequately encompass all possible variations.

Additionally, the cited figures actually fail to present the full measure of the anticompetitive situation since they focus entirely on national and even international markets. *See, e.g.*, Department of Justice Report at 171–72 n. 337, 173. To obtain a realistic picture, one must also evaluate the individual Regional Company power in their regional markets or submarkets. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 324–25, 82 S.Ct. 1502, 1523–24, 8 L.Ed.2d 510 (1962). In their regions, these companies occupy positions of unquestionable dominance,[139] and substantial anticompetitive effects would be felt in these regional markets if the manufacturing restriction were lifted.[140]

Suggestions have been made that, at least with respect to some items of equipment, not all Regional Companies would purchase it from their own affiliates. Not only is any such assumption contradicted by the Department of Justice and Huber reports,[141] but experience since divestiture has been that Regional Companies have entered markets, many entirely foreign to telecommunications, just as quickly as they were legally free to do so by judicial construction, waiver, or otherwise, and occasionally even when they were not legally free to do so. It would be entirely unrealistic to assume that these companies would hereafter fundamentally reverse their pattern of behavior and refrain from entry into the telecommunications and CPE businesses that are allied to enterprises in which these companies are already engaged and that are potentially fertile sources of cross-subsidy skim-offs.

The companies may also be expected to be motivated to enter these markets by the dynamics of the relations among them and the imperatives of the marketplace. Their corporate images will not tolerate their abstention, and a Regional Company that opted out may be found by shareholders and others to have passed up a profitable extension into an adjacent market.[142]

dum in Opposition to Defendants' Motion for Involuntary Dismissal, pp. 72–80, 363; Pretrial Brief for the United States, pp. 48–54, 57–60; Competitive Impact Statement at 9; Reply dated April 5, 1984 regarding section VIII(C) waivers, pp. 7, 14–16. Now, inexplicably, the Department states that antitrust concerns are not raised when monopolies are leveraged into a substantial portion of the equipment manufacturing market. Department of Justice Report at 162, 166, 176. No reason is furnished for this change in analysis.

139. Only large central office switches require economies of scale greater than those allowable in one Regional Company area. Huber Report at 16.16–17.

140. For example, Dr. Huber has concluded that elimination of the restriction would permit the Regional Companies to keep critical design information from non-affiliated manufacturers. Huber Report at 14.13, 14.20, 16.15, 16.19. Another conceivable course of conduct by the Regional Companies that could have an anticompetitive impact involves the provision of voice-data services that use the local loop simultaneously for voice conversations, data transmission, and other related services. In order for the local loop to be used in that manner, an electronic device is required on each end of the loop. *See* IDCMA Comments at 20–22. If each Regional Company had approximately nineteen million access lines, Huber Report at Table G.4, and each electronic device cost $300 per line, then each such company could control approximately a $6 billion equipment market within its own region. Translating this statistic to a national focus, more than a $40 billion market could be foreclosed to competition. "Such a development would be the death knell for domestic data communications equipment manufacturers." *See* IDCMA Comments at 20–21.

141. *See* note 135, *supra*. The Huber Report goes on to say (at 14.16–17):

> A much more plausible scenario would have the RHC entering into a joint venture with one of the established domestic or foreign manufacturers and then using its own captive affiliate to provide a protected sales base from which to attack national and international markets. Most foreign manufacturers are virtually guaranteed profitability in their home markets, by subsidies or captive sales at inflated transfer prices. For them, anything earned in the United States is a windfall. Indeed, many of these manufacturers claim to be aiming for about a 5 to 10 percent share of the U.S. market, which equates to about one RBOC's purchases. Of course, under any requirements contract between a foreign manufacturer and an RBOC, the affiliates would be fairly free to customize switches, develop idiosyncratic standards, and then charge speciality transfer prices for the specialty product provided.

142. *See* Comments of North American Telecommunications Association at 11–18.

employees of even that lower ceiling.[203] According to former FCC Chairman Fowler, this "severe reduction of our staffing level, if allowed to continue, will limit our ability to meet the demands of our ever increasing workload in a timely and responsive manner." Testimony before Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, U.S. House Committee on Appropriations, February 18, 1987, at 2-3.

B. *Cross-Subsidization*

The Court will now examine in more detail current regulations relied upon by those who claim that there has been a change and who, on that basis, advocate removal of the restrictions. This examination is conducted under two headings: regulations designed to deal with improper cross-subsidization; and regulations designed to prevent discriminatory interconnection. As will be seen *infra*, none of these regulations provides support for the cause of removal, for one of two reasons: (1) the particular regulation predates the decree and thus had addressed the problems on paper, but unsuccessfully, for many, many years; or (2) the regulation does not yet exist in effective form but is only on the drawing boards.

1. *General*

The cross-subsidization problem is as acute now as it ever was. The Huber Report states on the subject of cross-subsidization that (1) seventy to ninety percent of the costs underlying the interexchange access charges are joint and common; (2) the list of information provider costs that might overlap with exchange operating exchange costs is long and cross-subsidization opportunities are extensive; (3) there are substantial cross-subsidization opportunities in the Yellow Pages provision; (4) more than half the costs of a VSR service bureau (excluding network usage costs) are at least potentially shiftable; (5) seventy percent of electronic mail costs are potentially shiftable; (6) forty-four to seventy-eight percent of electronic credit card transaction services are potentially shiftable; and (7) seventy to ninety percent of alarm services costs are highly susceptible to misallocation.[204] What changes have occurred from the situation revealed by the trial record have been toward the existence of more problems in regulatory oversight rather than fewer.

It is intrinsically difficult for a relatively small group of regulators to prevent cross-subsidization within several multi-billion dollar entities, particularly if the entities are as complex internally and as fluctuating organizationally as the Regional Companies. Not only does each of these companies, as noted, represent a complicated mix between regulated and unregulated affiliates and operations, but the products, too, lend themselves easily to such a practice. As Dr. Huber observed, "... regulatory requirements that [Regional Companies] buy equipment competitively crumble quickly when the product being purchased

203. The Commission recently eliminated three auditors, comprising one audit team, in its Common Carrier Bureau.

204. Report at 3.49, 6.35, 6.36, 9.7-9.9, 10.22, 11.18, 12.5, and 13.10. According to some of the Regional Companies, the Huber Report has concluded that cross-subsidy concerns are not weighty. *See, e.g.*, Bell Atlantic Comments at 7. What Dr. Huber actually said was that "cross-subsidy through the shared use of resources that are *not* inherently common to regulated and unregulated operations is amenable to fairly straightforward regulatory supervision ... Resources that are common to two classes of operations are another matter entirely. *The regulatory history of separating costs between local and interexchange businesses is one of rampant and often deliberate cross-subsidy, blessed if not actually required by various regulatory bodies.*" Huber Report at 3.53 (emphasis added). Professor Hausman, an expert retained by AT & T in its litigation against MCI, who now supports Pacific Telesis, contradicts this conclusion, but he is able to do so only by ignoring the lessons of the government's and the private *AT & T* litigation. Affidavit of Jerry A. Hausman, attached to Motion of Pacific Telesis Group for Waiver of the Line of Business Restrictions. Similarly, the opinion of Bruce E. Stangle that vertical integration is pro-competitive under the circumstances here (Affidavit of Stangle attached to U S West Reply Memorandum, App.Tab. 12, pp. 15-19) is both wrong and it cannot overcome the contrary conclusion reached by the Court when the judgment was entered (and when the Bell System's motion to dismiss was denied), that is the law of the case.

ed.[148] The reason for that reticence is simple.

Bellcore has responsibility under the decree to prevent the technical fragmentation and hence the deterioration of the national telephone network; to perform the technical and engineering responsibilities that must be performed on a centralized basis if there is to be a single functioning system; to set the technical and performance standards for network equipment; and to act as a central liaison between the civilian telephone system and the military's and other emergency functions. *AT & T*, 552 F.Supp. at 208–09; *Western Electric Co.*, 569 F.Supp. at 1114–18. To decentralize or otherwise to limit the responsibilities of Bellcore so as to prevent its use as a vehicle for anticompetitive action by the Regional Companies would inevitably fragment and frustrate Bellcore's centralizing responsibilities which, notwithstanding the divestiture, permit the nation's telecommunications systems to continue to function on the basis of one national network with one national quality standard. It would also undermine Bellcore's ability to act as the critical link between the civilian telephone systems and the national defense communications networks.[149]

The Bellcore problem thus resembles the squaring of the circle. If Bellcore's powers are cut back to safeguard against Regional Company collusion in manufacturing, marketing, and purchasing, it will be deprived of the capacity to perform its national coordinating and standard-setting functions; if its powers are left intact, it will stand as a suitable vehicle for joint Regional Company action with respect to the manufacture of telecommunications equipment and CPE.

D. *Effect of Removal on Innovation*

Not only is there no basis for concluding that the conditions that caused the establishment of the manufacturing restriction in the decree have ceased to exist, but the removal of that restriction at this juncture would arrest or nullify significant positive developments that have occurred since then.

As discussed above, it cannot be seriously disputed that the Regional Companies' local exchanges continue to be monopolies; that a Regional Company that was permitted to enter manufacturing would satisfy its equipment needs exclusively or primarily from its own affiliate; and that such activities would contravene the very purpose of the decree—to prevent leveraging of Regional Company local exchange monopolies so as to foreclose independent manufacturers from a very substantial part of the telecommunications market. For these reasons, retention of the manufacturing restriction is supported by consumers,[150] interexchange carriers,[151] independent local exchange carriers,[152] cellular carriers,[153] manufacturers, suppliers, and servicers,[154] labor unions,[155] and state regulators.[156]

148. The Department of Justice relies on its old standby for situations presenting no answer consistent with its position—the possibility of a new antitrust action. Response at 124. *See* note 107, *supra*.

149. *Western Electric Co.*, 569 F.Supp. at 1113–15.

150. *E.g.*, Consumer Federation of America Comments at 2, 36–40; Ad Hoc Telecommunications Users Committee Comments at 11–12; International Communications Association Comments at 11–12.

151. General Electric Communications and Services Comments at 30–33; MCI Response at 70–79.

152. United Telecommunications Comments at 24–25; Taconic Telephone Corporation Comments at 14–17.

153. McCaw Communications Comments at 17–19.

154. Electronic Industries Association Comments at 18–22; North American Telecommunications Association Comments at 7–42; IDCMA Comments at 14–62; United States Telecommunications Suppliers Associations Comments at 17–53; Tandy Corporation Comments at 10–30; CBEMA Comments at 29–33.

155. Communication Workers of America Comments, Appendix at 6–9.

156. Public Service Commission of the District of Columbia Comments at 27–29, 36–38; Kentucky Public Service Commission Comments at 23–25, 28.

regulation or a substantial improvement in the regulatory language and practice.[194] Yet neither has occurred since 1982.

If anything, the need for the line of business restrictions is greater today than it was before the Bell System breakup. At least in theory, and to an extent in practice, the Bell System was regulated in almost all of its structures and operations.[196] By contrast, many of the current operations of the Regional Companies take place in unregulated markets. This complex mixture of regulated and unregulated activities provides these companies both with a powerful temptation and with ample opportunity to commit anticompetitive abuses in the competitive markets and to subsidize their competitive operations with profits earned in the monopoly markets.[196] In view of the fact that, when compared with the Bell System, the organizational state of the Regional Companies is much less rigid and far more complex—with their subsidiaries, partnerships, joint ventures, and other enterprises, some regulated, some unregulated, some regulated in part[197]—discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982.[198]

Fourth. To the extent that there has been any recent change in the regulatory picture itself, it has been to weaken the regulations governing telecommunications carriers, not to strengthen them. This is shown most dramatically by the FCC's repeal of the separate subsidiary requirement for Regional Company competitive enterprises—a requirement that it had theretofore regarded as its most effective regula-

194. Several Regional Companies would stand the relationship between the decree and regulation on its head, contending that criticism of the efficacy of various FCC rules "are in reality reargruments of issues already presented to and rejected by the Commission." *E.g.*, Reply of Pacific Telesis at 42–45; *see also* Reply of Southwestern Bell at 21–23. The decree in this case was premised in substantial part upon the inadequacy of regulation as a means for dealing with practices that violated the Sherman Act. It is absurd to maintain that, if the same or similar regulations are still inadequate and that the decree's removal standard therefore cannot be met, the restrictions should be eliminated anyway because the Commission has not seen fit to adopt more effective regulations, and reargruments have either not been made or were made and have failed. The governing law of the case here is the decree, not FCC decisions.

Furthermore, the FCC is of course not charged with the duty of enforcing the antitrust laws; indeed, the Commission has suggested that it is quite prepared to ignore or override antitrust concerns. FCC Response in Opposition to AT & T Motion at 4–5.

In sum, the Regional Company arguments constitute simply one more attempt to reverse the burden of proof, evidently because of the realization that they could not satisfy the section VIII(C) standard. *See also* notes 26, 35, 38, 90, *supra*.

195. However, the FCC had no direct regulatory responsibility over Western Electric or Bell Laboratories. Department of Justice's Third Statement of Contentions and Proof at 1846.

196. *See also United States v. AT & T*, 627 F.Supp. 1090, 1095–96 (D.D.C.1986).

197. In addition, the Regional Companies are frequently changing their organizational structure. *See Washington Post*, July 8, 1987, at F1, regarding an apparently fundamental change in the corporate structure of Bell Atlantic with substantial implications for the monopoly and competitive operations.

198. Since each of the Regional Companies operates in several states, the state and local regulatory bodies likewise have a very difficult job, for none of them is likely to be aware of the entire financial and operational status of a Regional Company. Thus, as the Colorado Public Utilities Commission points out, in a number of states the Regional Companies "are essentially unregulated although they absolutely and deeply affect the public interest," to the point where the Commission "cannot even look at the books and records of U S West," the Regional Company in that area. Comments at 2. *See also Louisiana Public Services Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

Several Regional Companies rely upon *Southern Motor Carriers v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), apparently for the proposition that the Sherman Act does not preempt state regulation. Reply of Pacific Telesis at 28–30. But the Supreme Court held in that case only that collective ratemaking activities are immune from antitrust liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That principle and that holding have no relevance to the instant lawsuit, let alone the instant proceeding.

on fixed rates of return as the principal source of their income must not be shut off.

In any event, insofar as this Court's obligations under the antitrust laws and under the decree are concerned, it is not prepared to halt the progress that has been made by independent manufacturers and sellers, large and small, toward a genuinely competitive environment in the telecommunications equipment market, by modifying the decree so as to turn back the clock toward domination of the market by the Bell monopolists.

E. *Foreign-Dominated Firms Crowding Out Specialized Manufacturers*

The Regional Companies finally contend that such factors as the economies of scale involved in manufacturing, the increasing standardization of interconnection requirements, and the vigor of the existing competition will prevent them from becoming regional monopolists should they be allowed into the manufacturing market. That contention, too, lacks merit.

In the first place, several of the assumptions underlying this contention are not correct. For example, although economies of scale apply to some types of equipment, they do not to others. Likewise, the trend in interconnection requirements for such items as data communications equipment has actualy been toward less uniformity.[165]

Beyond that, while the competitive nature of the equipment manufacturing business depends to an extent upon the type of market that is at issue, the fact that competition is presently healthy and strong in many markets does not diminish the ability of the Regional Companies to leverage their monopoly power should they be allowed into manufacturing.

The Department of Justice acknowledges that removal of the restriction will be followed by the displacement of many of the competitors, postulating that increasing concentration in the equipment markets is inevitable. Report at 171–76. However, trends with respect at least to some types of equipment have been precisely in the opposite direction, and whatever inevitability there is to greater concentration would flow primarily from the effects of the removal of the restrictions. *See* pp. 561–62, *infra*. The Department's position contemplates, with what may only be characterized as remarkable equanimity for an antitrust enforcement agency, the ready destruction of many high-quality firms producing high-quality goods that have emerged since divestiture, and that are performing important service to the economy. Indeed, according to another government agency, the Commerce Department's NTIA, the most innovative and efficient American businesses are rarely the largest or the most highly integrated but smaller, specialized firms.[166] NTIA Trade Report: *Assessing the Effects of Changing the AT & T Antitrust Consent Decree* at 17–18 (February 4, 1987).[167]

Moreover, the Department of Justice lack of concern regarding concentration ignores the effect such concentration will have on the survival of competition itself in several equipment markets, and the threat that will be posed by the ensuing manufacturing monopoly or oligopoly involving foreign firms. According to NTIA, the most plausible scenario in at least one telecommunications market is that, in the event of

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Perhaps even more telling is the Department of Justice's recognition that "[o]ne cannot be as definitive with respect to to the potential competitive effects of a [Regional Company's] provision of information services that use [its] local exchange facilities" as with respect to those that do not.[188] Report at 122.[189] As discussed above, almost all information services must and do use the Regional Companies' local exchange facilities.

In short, the reasons cited by the Court in 1982 and in 1984 are as valid today as they were then. There is no question but that the Regional Companies would have the same incentives and the same abilities attributed to them at that time, and that to open up the information services market to its full extent, as requested by some, would be to take the very risks[190] that neither the Department of Justice nor the Court were willing to take three years ago, and that the decree plainly forbids. The restriction on the sale by the Regional Companies of information content will accordingly be maintained. With respect to the issue of information transmission, *see* Part VIII, *infra*.

VI

Regulation

The Regional Companies and the Department of Justice argue that, unlike during the period prior to the entry of the decree, FCC regulation can now be depended upon to keep those in control of the local exchanges from engaging in anticompetitive activities, whether in interexchange services, in manufacturing, or in information services. The Court has carefully considered these arguments as well as the regulations on which they are based. Upon such consideration, the Court has concluded that there is no reasonable basis for assuming that the regulations will solve the antitrust problems presented by this case.

A. *General*

First. As discussed in Part I, *supra*, despite the decades-old requirements in the Communications Act, 47 U.S.C. § 202(a), and various FCC regulations requiring nondiscrimination, equal access, and proper cost allocations, and notwithstanding the Commission's own persistent and dedicated efforts for a number of years, the FCC was unable to prevent or to remedy major anticompetitive abuses by the Bell System achieved through the activities of its local affiliates.

A substantial part of the trial of this case revolved around the ever-changing Bell

188. Up-to-date information and constant availability are the features most sought by subscribers. Comments of Leghorn Publishing Company at 5.

189. The status of FCC regulation and its lack of present effectiveness are of course no different in the information services market than they are with respect to interexchange services and manufacturing (*see* Part VI, *infra*), and the division of the Bell System into seven Regional Companies and what progress has been made with respect to equal access have likewise no greater weight here than they have in the other contexts discussed above.

190. As the Committee of Corporate Telecommunications Users notes, there are also important privacy considerations at stake when, for example, a Regional Company, having control of its customers' lines of communication, will also have access to their lines of credit, travel plans, credit card expenditures, medical information, and the like. Comments at 17-19. On the basis of a subscriber's telephone calling patterns with respect to information, a Regional Company could easily pinpoint that subscriber for the sale of Regional Company-generated information and the sale of other products and services connected therewith, to the point where that company would have a "Big Brother" type relationship with all those residing in its region.

While the decisions on interexchange services (Part III) and on manufacturing (Part IV) are not particularly difficult, because no persuasive case has been or can be made that the particular restrictions are eligible on any reasonable basis for removal under section VIII(C) of the decree, the problem is more difficult with respect to the information services restriction which is discussed here and in Part VIII, *infra*.

If the Court were to consider only the request of the Regional Companies and of the Department of Justice for a complete removal of the restriction on the provision of information services, without distinction between content and transmission, that decision, too, would plainly have to be in the negative, for the information services restriction is supported by the same factors that require retention of the interexchange and manufacturing prohibitions.

As the Court stated in the 1982 Opinion explaining the provisions of the decree:

> All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same abilities to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. Here, too, the Operating Companies could discriminate by providing more favorable access to the local network for their own information services than to the information services provided by competitors, and here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.

AT & T, 552 F.Supp. at 189 (footnote omitted).

The Court went on to say at the time that, if the Operating Companies were excluded from the information services market, they would have an incentive to design their networks to accommodate the maximum number of information service providers on account of the earnings they could expect to receive from these providers in terms of access fees. On the other hand, if these companies were permitted to provide their own information services, their incentive would be "to design their local networks to discourage competitors, and thus to thwart the development of a healthy, competitive market." *AT & T*, 552 F.Supp. at 189–90 (footnote omitted).

Based upon these considerations, the Court has consistently upheld the restriction as incorporated in the proposed consent decree submitted by the parties. Thus, it explicitly rejected the suggestion, made early on, that the Regional Companies could "most efficiently provide information services by taking advantage of various economies," for example by the use of the same equipment for exchange telecommunications and information services. *AT & T*, 552 F.Supp. at 189 n. 238. The Court concluded that it would be impossible to determine whether such an advantage was due to inherent efficiencies or to efficiencies resulting from the deliberate design of the network in a discriminatory fashion. *Id.*[174] Similarly, in response to a 1984 request by the Regional Companies for a waiver of the line of business restrictions in section II(D)(1) of the decree, the Court reaffirmed that removal of the information services restriction would have to await "significant technological or structural changes" that would substantially reduce the dependence of information service providers on the local exchange networks. *AT & T*, 592 F.Supp. at 868. And the Court found that, as of that time, no such changes had occurred.[175]

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174. As explained above, network design is never complete; particularly where as dynamic a market as that for information services is involved, redesigns are not merely optional, they are often mandatory.

175. While competition in the various information services markets has substantially increased, *see* Part VIII, *infra*, these services vary widely with respect to concentration and ease of entry. Some markets, such as those for telephone answering services, public announcement services, and alarm monitoring, for example, are easy to enter and, in most geographic areas, unconcentrated. Others, including legal

NTIA,[182] but he correctly emphasizes that, because of their very nature, information services are especially vulnerable even to slight manipulation and discrimination, as they are also to small degradations in transmission quality. For that reason, he correctly concludes that the various examples of non-access-dependent services cited by the Department of Justice are not real substitutes, especially for "time-sensitive information services, [whose] competitive health ... depends strongly on continuing non-discriminatory access to [Regional Company][183] services and facilities." Report at 6.23. In another section in his report, he notes that

> [c]ompetition among database providers and electronic publishers is critically dependent on reliable fast delivery at a reasonable cost. The telephone network provides a critical link between many providers and their customers. The possibility of [Regional Company] entry into these information markets therefore raises the familiar concerns about the possibility of discriminatory access to [Regional Company] facilities.

Report at 7.7.

Again, according to Dr. Huber, the national value added networks "depend heavily on the [Regional Companies] to provide transparent access to end user's data traffic." Report at 5.13. In sum, while in his view new transport technologies are "on the horizon, the [Regional Company] still provides critical links in the transport pyramid." Report at 7.15.[184]

B. *Incentive and Ability to Discriminate*

It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to engage in anticompetitive conduct remains the same as it was when the decree was entered. The answer is plain. There has been no change whatever in this respect since 1984, and no demonstration that now, unlike then, there is no substantial possibility that the Regional Companies could not, and indeed would not, use their monopoly power to impede competition in the information services market.

The Regional Companies argue at some length that they have no incentive to discriminate against competitors in the information service market because to do so would diminish use of the network and hence a reduction in their revenues.[185] But in any market where the Regional Companies are in competition with independent information service providers, their economic interest lies in manipulating the system toward use of their own services, rath-

182. A technical analysis performed by NTIA likewise makes clear that the characteristics of alternatives relied on by the Department of Justice are incompatible with the needs of most information services: (1) private microwave systems require unobstructed line-of-sight transmission paths, and typical cost per small system is $12,000 to $38,000; (2) as to fiber optic systems, only thirty-three users of local fiber systems have been cited, targeted customers use either 24 or 672 voice grade equivalent channels, and primary use is for interexchange access or private networks; (3) only a small number of cable television systems have the costly equipment needed for two-way operations; (4) cellular radio systems are not generally appropriate for nonmobile service; costs make cellular service undesirable as a substitute for local service at this time; and long talking times could degrade service quality; (5) cost of digital termination systems may be higher than for microwave systems, over $7,850 per voice channel according to Bell Communications Research; and (6) satellite systems are most cost-effective for high traffic volume, long haul (greater than than 200 miles) applications, and cost per voice channel is as high as $2,000. NTIA, *Competition in the Local Exchange Telephone Services Market* at 29, 30-34, 37-38.

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VI

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A. *General*

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If anything, the need for the line of business restrictions is greater today than it was before the Bell System breakup. At least in theory, and to an extent in practice, the Bell System was regulated in almost all of its structures and operations.[195] By contrast, many of the current operations of the Regional Companies take place in unregulated markets. This complex mixture of regulated and unregulated activities provides these companies both with a powerful temptation and with ample opportunity to commit anticompetitive abuses in the competitive markets and to subsidize their competitive operations with profits earned in the monopoly markets.[196] In view of the fact that, when compared with the Bell System, the organizational state of the Regional Companies is much less rigid and far more complex—with their subsidiaries, partnerships, joint ventures, and other enterprises, some regulated, some unregulated, some regulated in part[197]—discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982.[198]

Fourth. To the extent that there has been any recent change in the regulatory picture itself, it has been to weaken the regulations governing telecommunications carriers, not to strengthen them. This is shown most dramatically by the FCC's repeal of the separate subsidiary requirement for Regional Company competitive enterprises—a requirement that it had theretofore regarded as its most effective regula-

194. Several Regional Companies would stand the relationship between the decree and regulation on its head, contending that criticism of the efficacy of various FCC rules "are in reality reargruments of issues already presented to and rejected by the Commission." *E.g.*, Reply of Pacific Telesis at 42–45; *see also* Reply of Southwestern Bell at 21–23. The decree in this case was premised in substantial part upon the inadequacy of regulation as a means for dealing with practices that violated the Sherman Act. It is absurd to maintain that, if the same or similar regulations are still inadequate and that the decree's removal standard therefore cannot be met, the restrictions should be eliminated anyway because the Commission has not seen fit to adopt more effective regulations, and reargruments have either not been made or were made and have failed. The governing law of the case here is the decree, not FCC decisions.

Furthermore, the FCC is of course not charged with the duty of enforcing the antitrust laws; indeed, the Commission has suggested that it is quite prepared to ignore or override antitrust concerns. FCC Response in Opposition to AT & T Motion at 4–5.

In sum, the Regional Company arguments constitute simply one more attempt to reverse the burden of proof, evidently because of the realization that they could not satisfy the section VIII(C) standard. *See also* notes 26, 35, 38, 90, *supra*.

195. However, the FCC had no direct regulatory responsibility over Western Electric or Bell Laboratories. Department of Justice's Third Statement of Contentions and Proof at 1846.

196. *See also United States v. AT & T*, 627 F.Supp. 1090, 1095–96 (D.D.C.1986).

197. In addition, the Regional Companies are frequently changing their organizational structure. *See Washington Post*, July 8, 1987, at F1, regarding an apparently fundamental change in the corporate structure of Bell Atlantic with substantial implications for the monopoly and competitive operations.

198. Since each of the Regional Companies operates in several states, the state and local regulatory bodies likewise have a very difficult job, for none of them is likely to be aware of the entire financial and operational status of a Regional Company. Thus, as the Colorado Public Utilities Commission points out, in a number of states the Regional Companies "are essentially unregulated although they absolutely and deeply affect the public interest," to the point where the Commission "cannot even look at the books and records of U S West," the Regional Company in that area. Comments at 2. *See also Louisiana Public Services Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986).

Several Regional Companies rely upon *Southern Motor Carriers v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), apparently for the proposition that the Sherman Act does not preempt state regulation. Reply of Pacific Telesis at 28–30. But the Supreme Court held in that case only that collective ratemaking activities are immune from antitrust liability under the state action doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That principle and that holding have no relevance to the instant lawsuit, let alone the instant proceeding.

ed.[148] The reason for that reticence is simple.

Bellcore has responsibility under the decree to prevent the technical fragmentation and hence the deterioration of the national telephone network; to perform the technical and engineering responsibilities that must be performed on a centralized basis if there is to be a single functioning system; to set the technical and performance standards for network equipment; and to act as a central liaison between the civilian telephone system and the military's and other emergency functions. *AT & T*, 552 F.Supp. at 208–09; *Western Electric Co.*, 569 F.Supp. at 1114–18. To decentralize or otherwise to limit the responsibilities of Bellcore so as to prevent its use as a vehicle for anticompetitive action by the Regional Companies would inevitably fragment and frustrate Bellcore's centralizing responsibilities which, notwithstanding the divestiture, permit the nation's telecommunications systems to continue to function on the basis of one national network with one national quality standard. It would also undermine Bellcore's ability to act as the critical link between the civilian telephone systems and the national defense communications networks.[149]

The Bellcore problem thus resembles the squaring of the circle. If Bellcore's powers are cut back to safeguard against Regional Company collusion in manufacturing, marketing, and purchasing, it will be deprived of the capacity to perform its national coordinating and standard-setting functions; if its powers are left intact, it will stand as a suitable vehicle for joint Regional Company action with respect to the manufacture of telecommunications equipment and CPE.

D. *Effect of Removal on Innovation*

Not only is there no basis for concluding that the conditions that caused the establishment of the manufacturing restriction in the decree have ceased to exist, but the removal of that restriction at this juncture would arrest or nullify significant positive developments that have occurred since then.

As discussed above, it cannot be seriously disputed that the Regional Companies' local exchanges continue to be monopolies; that a Regional Company that was permitted to enter manufacturing would satisfy its equipment needs exclusively or primarily from its own affiliate; and that such activities would contravene the very purpose of the decree—to prevent leveraging of Regional Company local exchange monopolies so as to foreclose independent manufacturers from a very substantial part of the telecommunications market. For these reasons, retention of the manufacturing restriction is supported by consumers,[150] interexchange carriers,[151] independent local exchange carriers,[152] cellular carriers,[153] manufacturers, suppliers, and servicers,[154] labor unions,[155] and state regulators.[156]

148. The Department of Justice relies on its old standby for situations presenting no answer consistent with its position—the possibility of a new antitrust action. Response at 124. *See* note 107, *supra*.

149. *Western Electric Co.*, 569 F.Supp. at 1113–15.

150. *E.g.*, Consumer Federation of America Comments at 2, 36–40; Ad Hoc Telecommunications Users Committee Comments at 11–12; International Communications Association Comments at 11–12.

151. General Electric Communications and Services Comments at 30–33; MCI Response at 70–79.

152. United Telecommunications Comments at 24–25; Taconic Telephone Corporation Comments at 14–17.

153. McCaw Communications Comments at 17–19.

154. Electronic Industries Association Comments at 18–22; North American Telecommunications Association Comments at 7–42; IDCMA Comments at 14–62; United States Telecommunications Suppliers Associations Comments at 17–53; Tandy Corporation Comments at 10–30; CBEMA Comments at 29–33.

155. Communication Workers of America Comments, Appendix at 6–9.

156. Public Service Commission of the District of Columbia Comments at 27–29, 36–38; Kentucky Public Service Commission Comments at 23–25, 28.

employees of even that lower ceiling.[203] According to former FCC Chairman Fowler, this "severe reduction of our staffing level, if allowed to continue, will limit our ability to meet the demands of our ever increasing workload in a timely and responsive manner." Testimony before Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies, U.S. House Committee on Appropriations, February 18, 1987, at 2-3.

B. *Cross-Subsidization*

The Court will now examine in more detail current regulations relied upon by those who claim that there has been a change and who, on that basis, advocate removal of the restrictions. This examination is conducted under two headings: regulations designed to deal with improper cross-subsidization; and regulations designed to prevent discriminatory interconnection. As will be seen *infra*, none of these regulations provides support for the cause of removal, for one of two reasons: (1) the particular regulation predates the decree and thus had addressed the problems on paper, but unsuccessfully, for many, many years; or (2) the regulation does not yet exist in effective form but is only on the drawing boards.

1. *General*

The cross-subsidization problem is as acute now as it ever was. The Huber Report states on the subject of cross-subsidization that (1) seventy to ninety percent of the costs underlying the interexchange access charges are joint and common; (2) the list of information provider costs that might overlap with exchange operating exchange costs is long and cross-subsidization opportunities are extensive; (3) there are substantial cross-subsidization opportunities in the Yellow Pages provision; (4) more than half the costs of a VSR service bureau (excluding network usage costs) are at least potentially shiftable; (5) seventy percent of electronic mail costs are potentially shiftable; (6) forty-four to seventy-eight percent of electronic credit card transaction services are potentially shiftable; and (7) seventy to ninety percent of alarm services costs are highly susceptible to misallocation.[204] What changes have occurred from the situation revealed by the trial record have been toward the existence of more problems in regulatory oversight rather than fewer.

It is intrinsically difficult for a relatively small group of regulators to prevent cross-subsidization within several multi-billion dollar entities, particularly if the entities are as complex internally and as fluctuating organizationally as the Regional Companies. Not only does each of these companies, as noted, represent a complicated mix between regulated and unregulated affiliates and operations, but the products, too, lend themselves easily to such a practice. As Dr. Huber observed, "... regulatory requirements that [Regional Companies] buy equipment competitively crumble quickly when the product being purchased

203. The Commission recently eliminated three auditors, comprising one audit team, in its Common Carrier Bureau.

204. Report at 3.49, 6.35, 6.36, 9.7-9.9, 10.22, 11.18, 12.5, and 13.10. According to some of the Regional Companies, the Huber Report has concluded that cross-subsidy concerns are not weighty. *See, e.g.*, Bell Atlantic Comments at 7. What Dr. Huber actually said was that "cross-subsidy through the shared use of resources that are *not* inherently common to regulated and unregulated operations is amenable to fairly straightforward regulatory supervision ... Resources that are common to two classes of operations are another matter entirely. *The regulatory history of separating costs between local and interexchange businesses is one of rampant and often deliberate cross-subsidy, blessed if not actually required by various regulatory bodies.*" Huber Report at 3.53 (emphasis added). Professor Hausman, an expert retained by AT & T in its litigation against MCI, who now supports Pacific Telesis, contradicts this conclusion, but he is able to do so only by ignoring the lessons of the government's and the private *AT & T* litigation. Affidavit of Jerry A. Hausman, attached to Motion of Pacific Telesis Group for Waiver of the Line of Business Restrictions. Similarly, the opinion of Bruce E. Stangle that vertical integration is pro-competitive under the circumstances here (Affidavit of Stangle attached to U S West Reply Memorandum, App.Tab 12, pp. 15-19) is both wrong and it cannot overcome the contrary conclusion reached by the Court when the judgment was entered (and when the Bell System's motion to dismiss was denied), that is the law of the case.

Additionally, the cited figures actually fail to present the full measure of the anticompetitive situation since they focus entirely on national and even international markets. *See, e.g.*, Department of Justice Report at 171–72 n. 337, 173. To obtain a realistic picture, one must also evaluate the individual Regional Company power in their regional markets or submarkets. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 324–25, 82 S.Ct. 1502, 1523–24, 8 L.Ed.2d 510 (1962). In their regions, these companies occupy positions of unquestionable dominance,[139] and substantial anticompetitive effects would be felt in these regional markets if the manufacturing restriction were lifted.[140]

Suggestions have been made that, at least with respect to some items of equipment, not all Regional Companies would purchase it from their own affiliates. Not only is any such assumption contradicted by the Department of Justice and Huber reports,[141] but experience since divestiture has been that Regional Companies have entered markets, many entirely foreign to telecommunications, just as quickly as they were legally free to do so by judicial construction, waiver, or otherwise, and occasionally even when they were not legally free to do so. It would be entirely unrealistic to assume that these companies would hereafter fundamentally reverse their pattern of behavior and refrain from entry into the telecommunications and CPE businesses that are allied to enterprises in which these companies are already engaged and that are potentially fertile sources of cross-subsidy skim-offs.

The companies may also be expected to be motivated to enter these markets by the dynamics of the relations among them and the imperatives of the marketplace. Their corporate images will not tolerate their abstention, and a Regional Company that opted out may be found by shareholders and others to have passed up a profitable extension into an adjacent market.[142]

dum in Opposition to Defendants' Motion for Involuntary Dismissal, pp. 72–80, 363; Pretrial Brief for the United States, pp. 48–54, 57–60; Competitive Impact Statement at 9; Reply dated April 5, 1984 regarding section VIII(C) waivers, pp. 7, 14–16. Now, inexplicably, the Department states that antitrust concerns are not raised when monopolies are leveraged into a substantial portion of the equipment manufacturing market. Department of Justice Report at 162, 166, 176. No reason is furnished for this change in analysis.

139. Only large central office switches require economies of scale greater than those allowable in one Regional Company area. Huber Report at 16.16–17.

140. For example, Dr. Huber has concluded that elimination of the restriction would permit the Regional Companies to keep critical design information from non-affiliated manufacturers. Huber Report at 14.13, 14.20, 16.15, 16.19. Another conceivable course of conduct by the Regional Companies that could have an anticompetitive impact involves the provision of voice-data services that use the local loop simultaneously for voice conversations, data transmission, and other related services. In order for the local loop to be used in that manner, an electronic device is required on each end of the loop. *See* IDCMA Comments at 20–22. If each Regional Company had approximately nineteen million access lines, Huber Report at Table G.4, and each electronic device cost $300 per line, then each such company could control approximately a $6 billion equipment market within its own region. Translating this statistic to a national focus, more than a $40 billion market could be foreclosed to competition. "Such a development would be the death knell for domestic data communications equipment manufacturers." *See* IDCMA Comments at 20–21.

141. *See* note 135, *supra*. The Huber Report goes on to say (at 14.16–17):

> A much more plausible scenario would have the RHC entering into a joint venture with one of the established domestic or foreign manufacturers and then using its own captive affiliate to provide a protected sales base from which to attack national and international markets. Most foreign manufacturers are virtually guaranteed profitability in their home markets, by subsidies or captive sales at inflated transfer prices. For them, anything earned in the United States is a windfall. Indeed, many of these manufacturers claim to be aiming for about a 5 to 10 percent share of the U.S. market, which equates to about one RBOC's purchases. Of course, under any requirements contract between a foreign manufacturer and an RBOC, the affiliates would be fairly free to customize switches, develop idiosyncratic standards, and then charge speciality transfer prices for the specialty product provided.

142. *See* Comments of North American Telecommunications Association at 11–18.

As presently drafted, the order would require each of the Regional Companies to adopt a cost manual in accordance with cost allocation standards,[210] and there would be rules for transactions with affiliates said to be designed to protect against cross-subsidization.[211] The Regional Companies had until September 1, 1987 to file their proposed cost allocation manuals. These manuals will hereafter each be subject to public comment and subsequently to review by the FCC for final approval. Based on normal regulatory schedules, some substantial period of time will elapse before this process is completed, and implementation of such manuals as are approved will obviously take some additional time. Finally, there is the delay inherent in petitions for reconsideration, *see* p. 574, *infra*, and the ever-present likelihood of requests for judicial review.

The problems with the *Joint Cost* order do not end with the timing of its issuance in final form; they also relate to substance. As stated above, and as experience has amply shown, cross-subsidization is easy to achieve by firms engaged in both regulated and unregulated business but difficult to detect and to remedy. If regulations are to have any hope of success, they must facilitate such detection to the maximum extent possible. The *Joint Cost* order is not likely to accomplish this objective. To the contrary, it complicates the process of detection by allowing each Regional Company (1) to adopt a manual different from the others; (2) to choose its own cost allocation procedures, (3) to select its own accountants to review and certify the manual,[212] and (4) to use its own reporting categories and terminology.[213] In short, there will be no common denominator. Additionally, the rules will apply only to interstate services, while much of the Regional Company business, mixed and interrelated though it is, is technically intrastate in nature.[214]

The Commission had its own good reasons for adopting this particular system,[215] and the choice of regulatory means is obviously a matter for decision by that body, not this Court. But the issue before the Court is whether changes have occurred since 1984 to render obsolete the line of business restrictions of the decree. To pass on that issue, the Court must necessarily consider the efficacy of the regulations that have been suggested as one such significant change. It is difficult to escape

210. These standards are based upon a fully distributed costing methodology, with emphasis on direct assignment of costs based on causation to the maximum extent possible.

211. The affiliate transaction rules would generally require that transactions between the Regional Companies and their affiliates be recorded on the books at market price at such price can be determined from a price list or tariff. In the absence of a list or tariff price, assets transferred from a Regional Company to its nonregulated affiliate are to be recorded at the higher of netbook cost or fair market value, while assets transferred from the nonregulated affiliate to the Regional Company are to be recorded at the lower of these two figures. Services for which there exists no list or tariff price are to be valued in accordance with the cost allocation standards.

212. As one intervenor correctly points out, much of the application of the FCC's rules to the billions of dollars in expenses and investment is a matter of policy rather than pure accounting, and certificates by the Regional Companies' own auditors therefore cannot serve as an effective check. Western Union Telegraph Company Comments at 3.

213. All these differences and potential inconsistencies dash any hope of achieving the kind of "benchmark" comparisons which, it is argued by some (*e.g.*, Ameritech Comments at 8–12; NYNEX Comments at 8–9; U S West Comments at 36–37) will make anticompetitive actions easier to detect.

214. *See* U.S. Sprint Comments at 30. Accurate auditing is further complicated by the fact that the Commission declined to require reporting at relatively precise intervals; that it authorized the allocation to regulated accounts of "incidental" expenses for up to one percent of a Regional Company's entire revenues (or approximately $100 million per year); and that it required the companies to keep their records for only one year. FCC Joint Accounting Order at ¶¶ 182, 185, 77, 186.

215. As the Commission stated (*Joint Cost Decision*, FCC 86-564 at ¶ 120 n. 225:

> We did not propose to prescribe a manual because we believed that the mix of nonregulated activities and the organizational structure would vary widely from carrier to carrier, and that a single manual would not adequately encompass all possible variations.

manufacturers would once again be disadvantaged and "the development of a competitive market would be frustrated." *Id.*

B. *Anticompetitive Activity is Probable*

In view of that relatively recent history, the question before the Court is whether a removal of the restriction is justified under section VIII(C) or whether such a removal would present a substantial risk that conditions of anticompetitive activity, concentration of the telecommunications equipment market in a few hands, monopolistic pricing, and a relatively sluggish pace of innovation, will return.

As will be seen *infra*, the short answer to the question about a renewal of anticompetitive activity here, as with respect to the interexchange restriction, is that no changes have occurred in the last three years that would warrant removal of the restriction on manufacturing: (1) the Regional Companies still have an ironclad hold on the local exchanges; (2) collectively they account for the purchases of what may be estimated at seventy percent of the national output of telecommunications equipment, only slightly less than the share of the pre-divestiture Bell System; (3) if the restriction were lifted, the Regional Companies may be expected to act as did the Bell System: they would buy all, or almost all of, of their equipment requirements from their own manufacturing units rather than from outsiders; (4) no measures, regulatory or otherwise, are available effectively to counteract such activities; and (5) in short order following removal of the restriction, a return to the monopolistic, anticompetitive character of the telecommunications equipment market would be likely, if not inevitable. The Court will now elaborate on several of these conclusions.[129]

The Department of Justice claims that technological and market changes, in addition to the existence of improved federal regulation, have rendered the manufacturing restriction unnecessary,[130] and in this assessment it is of course supported by the Regional Companies.[131] These changes, it is said, eliminate any substantial risk that the Regional Companies could use their monopoly power in the various telecommunications equipment or CPE markets.[132] That analysis is riddled with serious flaws.

First. The Department and the Regional Companies rely in substantial part on "the continued dispersal of equipment consumption, and the steady consolidation of equipment production," *e.g.*, Department of Justice Report at 161, stemming from the creation of the seven Regional Companies. On this basis, they claim that, because each company accounts for no more than a relatively small percentage of the purchases in any particular market, the purchasing decisions of one or several Regional Companies cannot have much impact on competition in the equipment market as a whole.

As explained above, on the most basic and literal level the existence of the seven Regional Companies is not a new development not contemplated when the decree was entered. Those who drafted, submitted, and approved the decree included the restriction on manufacturing at the same time as they provided, in the same decree, for the break-up of the Bell System into as many as twenty-two or as few as seven local units and hence into the corre-

others, the Court required modification of the proposed decree to permit the Regional Companies to provide CPE. Section VIII(A).

129. One of the issues, the impact of regulation, if any, is discussed in Part VI, *infra*.

130. Department of Justice Report at 161–71.

131. *See, e.g.*, Ameritech Comments at 7–10, 32–41; U S West Comments at 32–34; Bell South Comments at 19–24; Southwestern Bell Comments at 54–60. The FCC, too, supports the removal of the manufacturing restriction, as it does with respect to all the other restrictions, and as it did from the day they were entered as part of the judgment in this case. However, as will be seen below, another government agency, the NTIA of the Department of Commerce, expresses serious doubts on that score.

132. The Regional Companies have made no effort to show that any particular market to which they refer is a "relevant market or submarket" for purposes of antitrust analysis or that they do not possess market power therein. *See Standard Oil Co. v. United States*, 337 U.S. 293, 299–300 n. 5, 69 S.Ct. 1051, 1055 n. 5, 93 L.Ed. 1371 (1949).

> logical conditions, regulators would have to have sufficient foresight to determine in advance the discriminatory potential inherent in tomorrow's technology ... Even if it were possible, moreover, effectively to monitor the technical aspects of interconnection in an evolving technological environment, there would remain still more subtle means of discrimination in operational activities, such as the timely provision, maintenance, testing and restoration of facilities. In short, the BOCs, if permitted to engage in competitive activities, would have substantial ability to frustrate regulatory attempts to prevent discriminatory conduct.

Response to Public Comments at 58.

The Department of Justice now asserts that the FCC regulations that provide the requirements for the connection of terminal equipment to the local network, the so-called Part 68,[220] limit the risk of interconnection discrimination. *See, e.g.*, Department of Justice Report at 187–88 n. 379, 163–64.

Reliance by the Department on Part 68 is truly ironic: these regulations were adopted in 1975, 1976, and 1977; they had become fully operational long before divestiture; and, most notably, they were the subject of much testimony and argument adduced by the Department during the trial of this case, all of it designed to demonstrate that they were ineffective. In 1982, the Department noted that "the very basis for divestiture is that the anticompetitive problems inherent in the joint provision of regulated monopoly and competitive services are *otherwise insoluble.*" Response of the United States to Public Comments (May 20, 1982). Even if the technical aspects of interconnection were susceptible to regulatory monitoring, "there would remain still more subtle means of discrimination in operational activities such as timely provision maintenance, testing, and restoration of facilities." *Id.* The trial evidence did, in fact, demonstrate the FCC's lack of success in the enforcement of these regulations,[221] and neither the Department nor any Regional Company has pointed to any developments indicating that these enforcement problems could be or have now been overcome.[222]

2. *Regulations Not Yet Adopted*

The proponents of a removal of the restrictions contend with somewhat more confidence that the FCC's *Computer III* decision[223] would impede the Regional Companies' ability to discriminate with respect to interconnection. That decision permits the Regional Companies to provide enhanced services, *i.e.*, generally speaking, information services[224] without the structural separation that was required by the earlier *Computer II* decision, provided that those entities comply with newly developed Comparably Efficient Interconnection (CEI)[225] and Open Network Architecture

220. 47 C.F.R. § 68 (1986).

221. The Department of Justice observes with wry understatement that the "regulations predated the [decree], but the FCC initially had difficulty enforcing them against AT & T." Report at 164 n. 323.

222. Even if these regulations had now, somehow, become more effective, it would not advance the arguments of its proponents by very much. Part 68 does not apply to many services, including analog private lines (to which approximately seventy-five percent of all high-speed business modems are connected), new digital service, and new data-over-voice services, and it also fails to prescribe the standards necessary to ensure that CPE will effectively operate in conjunction with the transmission service to which it is connected.

223. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, F.C.C. 86-252 (released June 16, 1986) (*Computer III*).

224. Nothing comparable to the *Computer III* rulemaking has been undertaken regarding equipment procurement. Dr. Huber and the Department of Justice accordingly agree that "the discretion afforded management in purchasing decisions by regulators is quite broad." Huber Report at 14.13, 14.17.

225. CEI requires the Regional Companies to offer to enhanced service providers, with some exceptions, the same interconnection features on an unbundled basis and at the same price, as are enjoyed by these companies for their own equivalent services. *Computer III*, 104 F.C.C.2d at 1039–43, 1046–53.

gaged in three general types of anticompetitive conduct with regard to the telecommunications equipment and CPE markets.

First. As testimony and other evidence demonstrated, the Operating Companies managed, by one strategem or other, to purchase Western Electric's products, even when those products were more expensive or of lesser quality than alternative goods available from unaffiliated vendors.[122]

Second. The Operating Companies and Bell Laboratories (the Bell System's central research and engineering affiliate)[123] engaged in discrimination in the dissemination of information and design by granting Western Electric premature and otherwise preferential access to necessary technical data, compatibility standards, and other information about the Operating Companies' needs and requirements and the evolving characteristics of the local exchange. The delays encountered in these respects by Western Electric's competitors frequently made it difficult, if not impossible, for them to compete for Operating Company business: Western Electric was ready with the products when they were needed, and the competitors were ready several months later. The not unexpected result was a further skewing of procurement toward the Bell System's manufacturing arm and away from independents.

Third. The Bell System subsidized the prices of its equipment with the revenues from the Operating Companies' monopoly services.[124] The effect of this practice, as with respect to cross-subsidization generally, was (1) to permit the Bell System to undercut other producers of equipment (which lacked such a subsidy), and (2) unfairly to burden the consumers with exces-

122. More specifically, the Court found, commenting on the government's evidence of anticompetitive conduct:

> This evidence tended to show that the general trade manufacturers encountered a considerable number of obstacles in trying to design equipment for, and to sell this equipment to, the Bell Operating Companies, and that these obstacles perpetuated a buy—Western bias. For example, the competitors had difficulty in locating the employee in Western or the Operating Companies authorized to negotiate a sale; in obtaining from Bell compatibility specifications (without which general trade products could not be designed for interconnection with the Bell network); and in persuading Bell Labs to complete objective evaluations (which were usually required before sales could be effected). The government's evidence further indicated that Bell did not authorize the purchase of the general trade equipment even if no Bell product of equivalent quality, cost, or technical sophistication was available; instead, crash programs were initiated to develop competing Western products (to the extent that, in one instance, Western literally copied the general trade product so that it did not need to wait for the design and development of its own model). Operating Company employees were under pressure from AT & T officials to buy from Western (even when a general trade product was cheaper or of better quality) or to wait until a Western product comparable to the desired general trade equipment was available, and they were required to provide detailed justifications for general trade purchases which were not necessary for the purchase of Western equipment.
>
> The evidence supporting the seventeenth episode, the "umbrella" package, shows that, despite a stated policy to the effect that the Operating Companies were to buy the best quality equipment at the lowest price regardless of source, the structural relationship among the various components of the Bell System generated a pro-Western, or in-house bias in the Operating Companies' purchasing practices (footnotes omitted).

AT & T, 524 F.Supp. at 1371–72.

123. Bell Laboratories is a scientific facility that has often been said to be without parallel anywhere in the quality of its scientific achievement.

124. The Court described this process in its 1981 Opinion as follows:

> ... [the government's] experts have testified that a combination of vertical integration and rate-of-return regulation has tended to generate decisions by the Operating Companies to purchase equipment produced by Western that is more expensive or of lesser quality than that manufactured by the general trade. The Operating Companies have taken these actions, it is said, because the existence of rate of return regulation removed from them the burden of such additional expense, for the extra cost could simply be absorbed into the rate base or expenses, allowing extra profits from the higher prices to flow upstream to Western rather than to its non-Bell competition. *See Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir.1979); *Six Twenty-Nine Productions v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir.1966); 3 Areeda & Turner, *supra*, ¶ 726, p. 218 (footnote omitted).

AT & T, 524 F.Supp. at 1373.

on it as ensuring, in the words of section VIII(C) of the decree, that there is no substantial possibility that the Regional Companies could use their monopoly power to impede competition.[234]

3. *ONA Suffers From Significant Defects*

Additionally, here again, even if these regulations were fully in force and effect, they would not be likely to have a decisive impact, for several defects in such standards as have been announced are already apparent.

First, as several intervenors[235] note, ONA will apply only to digital switches—switches that serve only one-fourth of all access lines available. Second, ONA will not assure equal access or equal cost since it will not require the Regional Companies to provide colocation of competitors' enhanced services within the Regional Companies' central offices.[236] Third, the Regional Companies will have no incentive to provide equal access for rival enhanced service providers, for with respect to these potential competitors, the Regional Companies will not be disinterested parties if the restriction is lifted. Fourth, ONA, as it stands now, will not address problems that will arise with new technical developments, but it applies only to conditions that pertain to current technology and those that are plainly anticipated now.[237] Fifth, the only Regional Company to have filed its CEI plan as of May 1987—Bell Atlantic—has submitted what may be a flawed product, for it eliminates outside plant and transport costs for its own service, while charging standard tariffs for competitors' access. Reply of Consumer Federation of America at 7.[238]

4. *Other Standards*

The Regional Companies and those who support their requests also place some faith in national and international standards for interconnection.[239] But not only is it not at all clear that across-the-board, uniform national standards even exist,[240] but what standards there are have in part been established by private organizations, some of them dominated by the Regional Companies themselves.[241] Furthermore,

234. The Centralized Operations Groups (COGs), which process, coordinate, and schedule orders for CPE interconnection, are also claimed to reduce the possibility of discrimination, particularly with respect to installation, repair and maintenance of CPE. Department of Justice Report at 164. COGs are not, however, the exclusive means by which CPE vendors place their orders. For example, a Regional Company's own CPE vendor does not have to place its orders through this mechanism. BOC Structural Relief Order at ¶¶ 82–83. The COGs were developed primarily for orders placed by PBX and key system vendors and have rarely been used for orders placed by data communications equipment vendors. It is not clear whether a Regional Company manufacturing CPE would have to place orders for interconnection of its own CPE through the COGs. Furthermore, the COGs are not required to handle maintenance. BOC Structural Relief Order at ¶¶ 82–83.

235. *E.g.*, Compuserve Comments at 31; MCI Response at 56.

236. Comments of Consumer Federation of America at 15; U S Sprint at 30; IDCMA at 53–54.

237. While the Regional Companies' ONA plans must allow all competitors to obtain "unbundled and equal" access to "basic service functions," *see* Department of Justice Report at 141, the Regional Companies retain control over the degree of unbundling, the development of new basic service functions, and the price for access to these functions. Thus, whenever a competitor's product or service will require novel and specialized access requirements, the Regional Companies' will have a further opportunity to discriminate in the form of access.

238. As for the CEI requirements, they provide very little protection against discrimination because there are numerous possible interpretations of CEI, MCI Comments at 55 n. 161, and because a Regional Company need not provide CEI until it decides to offer an enhanced service. United Telecommunications Comments at 21–22. The *Computer III* rules require that a Regional Company seeking to provide a particular enhanced service on an unseparated basis first obtain FCC approval of a plan providing CEI for other enhanced service providers. *Computer III* ¶ 190. 104 F.C.C 2d at 1054–55.

239. *See, e.g.*, Department of Justice Report at 164.

240. *Compare* Department of Justice Report at 196 *with* IDCMA Comments at 42 n. 101.

241. For example, the T–1 Committee, administered by the Exchange Carriers Standards Organization, is said to be dominated by the Region-

The Department's analysis appears to be correct, at least as of now,[111] but that alone does not resolve the issue before the Court. On a purely literal level, interexchange cellular radio is an interexchange service as defined in section II(D)(1) of the decree. As such, it is of course prohibited to the Regional Companies absent developments that would cause the Court to find that, contrary to cellular radio's status at the time of the entry of the decree, its dynamics have changed to the point that there is no longer a substantial possibility that it could be used to impede competition. It cannot reasonably be claimed that such new developments have taken place.

More substantively, the entry of the Regional Companies into the cellular business without individualized scrutiny[112] would raise precisely the same concern that led to the adoption of the interexchange restriction in the first place: the possibility of discrimination against interexchange competitors in the provision of the access needed to reach the cellular customers.[113] A number of developments contribute to the conclusion that such discrimination is not only possible but probable.

In the first place, several of the Regional Companies are not even willing to accede to the minimal Department of Justice recommendation that, should they be allowed into the interexchange market, they grant complete equal access to competing interexchange carriers, included in the intra-LATA portion of the cellular systems.[114]

Moreover, without even having been in the interexchange cellular business across the board, the Regional Companies appear to have engaged in acts of discrimination against other mobile services providers—activities that do not inspire confidence that, should the companies be permitted to enter the cellular market without limitation, they would treat competitors in an even-handed manner. According to the Huber Report itself—upon which the Department of Justice otherwise heavily relies—the Regional Companies have used their control over the local bottlenecks in a variety of ways to impede competition by providers of mobile service. Some of these anticompetitive activities are catalogued at pp. 580–81, *infra*.

There is also the broader concern that, should the motions be granted, a Regional Company could evade the basic interexchange services restriction itself by the simple expedient of constructing a connection between its mobile telecommunications switching offices and any of their standard end offices, thus providing long distance service throughout the country through a combination of cellular and standard interexchange facilities.

Several of the Regional Companies, *see, e.g.*, U S West Memorandum at 159–60 & n. 171, rely on the grant by the Court of several waivers on a case-by-case basis with respect to interexchange cellular services, contending that such waivers established the principle that the test of section VIII(C) has been satisfied. Not only is that contention entirely erroneous, but it exemplifies the attempts made from time to time by Regional Companies to take advantage of extremely limited precedents as bases for broad departures from the requirements of the decree.

Whenever the Court has granted waivers, it was essentially in the context of representations that highways and automobile traffic patterns (typically in large met-

111. There are indications that the cost and the price of cellular radio are falling, and that in the future it may become competitive with landline interexchange services.

112. Such scrutiny is now provided by the waiver request mechanism.

113. For that reason, the Department of Justice in 1983 took precisely the opposite position to that which it is taking now. Memorandum of the United States of May 19, 1983, at 18, although cellular radio then, even more than now, served a separate market.

114. In response to the Department of Justice's equal access recommendation, one Regional Company observed that there was no "sound reason why Bell Atlantic should be required to provide equal access to inter-LATA calls completed within an area served by the same cellular switch." Bell Atlantic's Opposition to Conditions Specified in the Department's proposed Order, at 11.

Data communications equipment requires careful attention to and coordination with all the parameters of the transmission facilities with which it is to be used, because such equipment is operable only if the equipment at the customer's premises mirrors that at the exchange carrier's serving offices—the standard for one dictates the standard for the other. Thus, any disparity in access to information about the characteristics of existing, changed, or new transmission services can result in substantial differences in equipment design, characteristics, and costs. Since the FCC regulations do not require the disclosure of network requirements, their effect is likely to be to leave independent manufacturers hopelessly behind.

The FCC has also issued regulations that are claimed to prevent a Regional Company from obtaining an unfair head start over CPE rivals. These regulations would in theory prevent a Regional Company from using its local exchange status to utilize customer proprietary information unavailable to rivals in a dependent competitive market. 47 C.F.R. § 64.702(d)(3) (1986); BOC Structural Relief Order at ¶ 70. *See* Department of Justice Report at 164–65; Response at 113. However, that regulation, too, contains at least one very large loophole.

The regulation addresses only the use of customer proprietary network information for CPE marketing; it is not concerned with CPE manufacturing even though manufacturing information could and no doubt would also be used to gain advantage in that market. It is generally understood that it is highly important for anyone attempting to decide what new products to develop to have access to information regarding customers' network configurations, traffic patterns, and current equipment capabilities. The Department of Justice, for one, recognizes this defect but overcomes it by "presuming" that the FCC "would impose customer information rules that would prevent a BOC from discriminating...." Report at 187–88 n. 379. This speculation is an insufficient foundation upon which to base the removal of a restriction that effectively and *presently* reduces the possibilities of discrimination.[246]

In sum, the regulations relied upon by the Regional Companies and the Department of Justice to curb discrimination by the Regional Companies against their putative competitors in the markets they seek to enter are entirely inadequate: they either predate the decree and were found at the trial to be ineffective; they are not sufficiently comprehensive; they contain large loopholes; or they are a long way from being promulgated, let alone being implemented.

VII

Regional Company Activities and Public Policies

In addition to the factors discussed in the preceding sections of this Opinion upon which the Court's decision denying the motions for removal of the core restrictions is based, there are several other considerations much mooted by the parties and intervenors. Since these considerations are argued at some length by parties and intervenors, and since the Court also refers to them at times, they are discussed herein, albeit not at great length or detail. How-

246. The FCC regulation also permits Regional Company CPE personnel to have access to the CPNI of only those multiline business customers that have provided the Regional Companies with written authorization for such access; such information will be available to competing CPE vendors only if the customer takes affirmative action to permit them to have access. BOC Structural Relief Order at ¶ 70. Even though some CPE users may be sufficiently alert to seek competing bids from both Regional Company and non-Regional Company CPE vendors, the phenomenon of inertia and the inherent limitations on the dissemination of information will probably create an additional inequality between CPE vendors affiliated with a Regional Company and those that are not. IDCMA Comments at 39; *cf.* Department of Justice Response at 114; FCC Comments at 18. As Dr. Huber concedes, the effectiveness of these regulations will in practice will be difficult to ascertain. Huber Report at 16.22. *Accord* CBEMA Comments at 17–27; Consumer Federation of America Comments at 5–16; ICA Comments at 5–6; MCI Comments at 54–62; NASUCA Comments at 8–24; Tandy Comments at 28–29; USTSA Comments at 46–49; Washington PSC Comments at 23–24.

3. *The GTE Analogy*

Several Regional Companies[102] argue that, inasmuch as the Court approved the antitrust consent decree involving GTE, which does not include line of business restrictions similar to those in the instant decree, consistency requires the removal of the restrictions here. There is no merit to that contention.

[7] In the first place, it cannot reasonably be argued that the adoption of the GTE decree constitutes a change in terms of the section VIII(C) standard of the decree in the instant case. To put it another way, the Regional Companies lack standing to seek a modification of this decree merely because the Department of Justice agreed to a consent decree in another antitrust suit with an entirely different defendant, and the Court approved that decree. The Department of Justice was surely not required under law to insist upon parity in the *GTE* case with the remedy adopted in the *AT & T* case.[103] As for the Court, it was obliged to give, and it did give, considerable deference to the parties and the agreement they had reached when it, in turn, passed on the GTE consent decree. *AT & T*, 552 F.Supp. at 151.[104]

Furthermore, when the Court approved the GTE decree in December 1984, it carefully considered the similarities and differences between the Regional Companies and GTE, and it concluded, agreeing with the Department of Justice, that different treatment was justified, for the following reasons:

> To be sure, in some significant respects, particularly size and scope of operations, GTE more or less matches the Bell Regional Holding Companies (at least the smaller ones). In other ways, however, the two types of entities differ to some substantial degree.
>
> Each of the Bell regional companies has a very strong, dominant position in local telecommunications in the area in which it serves; GTE's operations, by contrast, are widely scattered. Moreover, the Regional Holding Companies also have the facilities to provide all the intercity and inter-LATA traffic throughout their regions, while the GTE Operating Companies control little by way of intercity facilities, and what facilities they do have are by and large of the entrance type which do not cover the areas in which the companies operate. (Transcript of Hearing at 40–41). Finally, internal planning documents of GTE and Sprint indicate that Sprint's interexchange network will, even by 1985 or 1986, reach only sixteen GTE cities (Transcript of Hearing at 42), and the Department of Justice has observed that of all access lines in existence, only one or two per cent are in GTE cities, and that Sprint has the fewest of these. (Transcript of Hearing at 41). All these factors suggest that entry by other interexchange carriers into the local markets dominated by GTE is far less likely and the anticompetitive effects of improper GTE actions will be both less probable and more easily detectable (footnotes omitted).

United States v. GTE Corp., 603 F.Supp. 730, 737 (D.D.C.1984). Nothing of significance has occurred since the GTE decree was entered to alter that assessment.

It is also worth noting that, when counsel for the Department of Justice appeared before the Court to defend the GTE settlement, he advised the Court that, should the Court believe that approval of that settlement might in any way cast doubt upon the appropriateness of the restrictions in the Bell System decree, the Department would prefer that the Court disapprove the GTE consent decree rather than to cast any shadow on the Bell System decree, particu-

102. *See, e.g.*, Southwestern Bell Comments at 25–27; U S West Comments at 39–40.

103. The fact that one of the seven Regional Companies may or may not be more dispersed than GTE was at the time of the consent decree, *see* U S West Reply at 23 and supplemental Appendix 6, is therefore irrelevant.

104. As indicated above, the decree in the Bell System case basically rests upon the twin pillars of (1) the divestiture of the Operating Companies from AT & T, and (2) the line of business restrictions on the divested companies. The GTE decree involves a different structure and different remedies.

tee of the National Association of Regulatory Utility Commissioners (NARUC), issued a report based upon audits of five Regional Companies—Bell Atlantic, BellSouth, U S West, Ameritech, and Pacific Telesis. The committee found that (1) during the audit process, the Regional Companies consistently attempted to block access to accounting and cost allocation records; (2) the information provided was frequently of poor quality; (3) the audit revealed that customers of several Regional Companies had improperly been forced to subsidize the activities of competitive subsidiaries of these companies; (4) valuable lines of service (*e.g.*, Yellow Pages) were transferred from the telephone companies to unregulated subsidiaries;[252] and (5) the Regional Companies tended to transfer virtually all telephone income to the parent Regional Companies, with minimum infusions of equity from these companies to the telephone subsidiaries.[253] Comments of Washington Utilities and Transportation Commission at 3–5, citing "Summary Report on the Regional Holding Company Investigations," National Association of Regulatory Utility Commissioners, Washington, D.C., September 18, 1986. Similar findings were reported by the staff of the California Public Utilities Commission with respect to Pacific Telesis.[254]

Further, in actions that likewise remind the Court of much of the evidence adduced during the trial regarding the Bell System's manouvers toward competitors' requests, Bell Atlantic claims that it is technically impossible to provide equal access for mobile calls originating and terminating in the Washington/Baltimore area (Opposition to Conditions at 11–12); BellSouth says that it cannot do so for calls terminating at a mobile phone in certain cellular service areas (Response at 9); and according to complaints filed with the Department of Justice, Bell Atlantic, NYNEX, and Southwestern Bell have all refused to furnish to interexchange carriers access to information, such as the mobile service customers' names, that is a necessary prerequisite to the marketing of the carriers' services. Dun & Bradstreet Corporation Comments at 34–37; Phonequest, Inc. Comments at 15; ALC Communications Corporation Comments at 29–30; Huber Report at 3.30 & n. 105.[255]

A number of other allegedly anticompetitive acts of Regional Companies have been brought to the attention of the Court, the Department of Justice, the FCC, or the public by various segments of the telecommunications industry. *See, e.g.*, pp. 566–67, and note 101, *supra*. These individual complaints will no doubt be resolved in due course, and in any event, no purpose would be served by a catalogue here. Such a listing would be bound to leave out some meritorious claims, and it is equally probable that it would include others that will ultimately be determined to be unfounded. It may be useful, however, to examine the recent performance of the Regional Companies from a somewhat broader perspective.

2. *Statistical Analysis*

Following the divestiture, the telephone Operating Companies controlled by the Regional Companies requested and were awarded large rate increases almost every-

252. The lack of restraint practiced by some Regional Companies is illustrated by those actions. The Court required an amendment of the proposed consent decree to provide for the transfer of the Yellow Pages to the Regional Companies, in significant part as a means for subsidizing local telephone rates. *AT & T*, 552 F.Supp. at 194. Notwithstanding that history, Yellow Pages profits now frequently go elsewhere (although it appears that, in some instances, transfers of the directory businesses to non-telephone affiliates were halted after state-initiated court battles).

253. No procedures are prescribed, or even under consideration, by the FCC for identifying the cost of the access services that the Regional Companies would have to provide to themselves in furnishing interexchange services. Such a task would appear to be immense.

254. California Public Utilities Commission, *A Report on Pacific Bell's Affiliated/Subsidiary Companies*, Proceeding No. A.85-01-034, Exec. Summary at 2-3 (June 3, 1986).

255. The Department of Justice has declined to take action, but the Court is considering the matter. *See* Order of May 19, 1987, ordering the Department to file a report.

ence of the seven Regional Companies in lieu of the one Bell System; (3) "substantial implementation" of equal access;[91] (4) the GTE analogy; and (5) the possibility of new antitrust suits.

The issue of regulation, which is common to the disputes involving all three of the core restrictions, is discussed with respect to all of them in Part VI, *infra*. As for the remainder, some of the claimed developments have not, in fact, occurred, and others have not had an effect on the interexchange services market.

1. *Division of Bell System Into Seven Companies*

Much is made by the Regional Companies of the circumstance that they are seven while the Bell System was only one. The difficulty with the arguments advanced based upon that undoubted fact is that the independence of the Regional Companies from the Bell System does not constitute a new development; it was mandated in the very same decree that also mandated the interexchange restriction. The decree, in fact, assumed the necessity for that restriction notwithstanding the breakup of the Bell System into seven or more new entities.[92]

During the proceedings that led to the approval and entry of the decree, the Bell System advised the Court that its evaluation of the decree could and should be premised on the existence of seven Regional Companies,[93] and the Court did just that.[94] The record shows without the slightest ambiguity that the consequences that were to flow from the divestiture and the restrictions were identified and taken into account in 1982 with respect to the post-divestiture Regional Companies, not merely the pre-divestiture Bell System.

That was so because the crux of the problem prior to the divestiture was not so much the size of the Bell System (although that played a part) but its control of the local exchange bottlenecks. Now that the control of these bottlenecks has shifted to seven regional entities, they must necessarily be limited as was the Bell System to prevent their exploitation of these bottlenecks, absent some substantive change. And, as discussed in detail above, there has been no substantive change: the bottlenecks are as pervasive as ever. It is undoubtedly for these reasons that the Department of Justice, too, recognizes that "the fact of divestiture itself" is not "a sufficient changed circumstance" to justify a modification of the restrictions. Reply at 57.[95]

The Regional Companies further argue that now, unlike then, benchmarks exist by which the performance of one of them can be measured against that of the six others.[96] Again, the possibility of the existence of benchmarks was necessarily included in the decree assumption which imposed the restrictions upon the several successors of the Bell System. Beyond that, as discussed in Part VI, *infra*, the Regional Companies are free, by virtue of the regulations proposed by the FCC, to adopt entirely dissimilar accounting and other procedures, making impossible intelligent

91. *See also* Department of Justice Report at 68–70.

92. Under the decree the restriction would have applied even if the Bell System had been divided into twenty-three independent entities (AT & T and the twenty-two Operating Companies). The combination of the Operating Companies under the aegis of seven holding companies thus constituted less of a dilution of centralization than the decree allowed.

93. AT & T Reply Comment dated May 21, 1982, at 4–5.

94. *AT & T*, 552 F.Supp. at 142 n. 41, 201, 214 n. 346.

95. The Regional Companies are far from being of a size that can easily be regulated or whose operations can be otherwise be scrutinized without difficulty. The smallest would rank in the Fortune 20 in terms of assets and the Fortune 50 in terms of sales. Comments of Dun and Bradstreet at 40–41. Moreover, their complex organizational structures compared to that of the Bell System further complicates any effective scrutiny of their activities to determine whether they are consistent with the decree. *See* sections V and VI of the decree.

96. *See, e.g.*, Ameritech Reply at 3–7.

subsidization would also take place with respect to these new markets, and that it would occur on a far wider and more destructive scale than heretofore. That is so if only because cross-subsidies are much more easily concealed where—as between local exchange service and interexchange, telecommunications manufacturing, and information services—there are many common costs that can be attributed, almost at the companies' unfettered choice, to any of the various activities, than where cross-subsidization is attempted between exchange service and ventures foreign to telecommunications (*see* Part IX, *infra*).

One likely consequence, then, of Regional Company entry into the interexchange, manufacturing, and information services markets would be to give these companies the ability to undersell their rivals in these markets because they would have at their disposal an ever-repleneshing fund with which to subsidize their competitive operations—the monies contributed pursuant to regulatory compulsion by the nation's local ratepayers.[262] The decree was, of course, aimed in significant part at the avoidance in the future of such practices.

B. *Other Public Policies*

A number of well-defined public policies were considered by the Court when it approved the proposed consent decree. As the Court then stated, while the issues of competition and the effects of competition or obstances to free and fair competition are "at the heart of the antitrust laws," and must therefore be deemed matters of paramount concern with respect to the decree, *AT & T*, 552 F.Supp. at 150, "when choosing between effective remedies, a court should impose the relief that impinges least upon other public policies." *Id.* at 150–51. As elaborated on below, the Court took account at that time of such interests as ratepayer protection, the congressional mandate of universal service, and the First Amendment, among others, *AT & T*, 552 F.Supp. at 183–88, and so did the Department of Justice. *See, e.g.*, Competitive Impact Statement, February 10, 1982, at 47.

Entities such as AT & T and MCI now argue for consideration of the same types of factors as were considered before, AT & T Comments at 63; MCI Comments at 92–95, while the Department of Justice and the Regional Companies contend that the Court is precluded from doing so. *See infra*. As indicated in Part II, *supra*, the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place.[263] The positions of the Department and the Regional Companies with respect to the consideration of such factors are not only at odds with that test, they are also inconsistent with the views these entities have expressed in the past and some that they are expressing even now.

262. It is relatively easy, at least in some states, for the large and powerful Regional Companies to secure rate increases from the relatively small, understaffed local regulators who, moreover, are confined jurisdictionally to substantially smaller geographic areas. *See* note 198, *supra*.

According to the Ohio Office of Consumers' Counsel, Bell of Pennsylvania offered $100 million for state economic development in exchange for deregulation legislation. Reply at 13. A recent comprehensive report of the operations of NYNEX complains about the inability of regulators over the opposition of NYNEX to secure financial data, to halt the diversion of economies achieved by the regulated segment to the benefit of non-regulated operations, and similar problems. New York State Department of Public Service, *Report on NYNEX Corporation and Affiliates* (March 1987). And the trade press reported recently that U S West informed state regulators in its area that the location of its planned research laboratory would depend upon the fate of deregulation legislation or upon requested rate increases, a charge that U S West has denied. *Communications Week*, August 3, 1987, at 1.

263. CyberTel Corporation suggests, with some justification, that removal of restrictions should appropriately encompass the Tunney Act public interest standard that governed approval of the decree and that was responsible for the inclusion of the very section VIII(C) at issue here. Comments at 4. *Cf. FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 1003, 97 L.Ed. 1470 (1953). Unless this is done, the imposition of restrictions and their removal may be governed by disparate tests—a situation that could result in severe logical and practical difficulties.

this project—preclude any thought of a duplication of the local networks.

Only when a practical and economically-sound method is found for large-scale bypass or for connecting local consumers by a different method—as microwaves and satellites were ultimately found to be feasible for handling long distance traffic—can the Regional Companies' local monopoly be regarded as eroded. Accordingly, waivers of the restriction could not be granted based on an absence of state and local regulation unless these regulatory changes were accompanied by substantial changes in telecommunications technology, the economics of the provision of local telephone service, or both.

Second. As experience has shown, to hold out to the Regional Companies the prospect of piecemeal waivers or similar judicial orders under the imprecise conditions suggested by the Department of Justice would (1) serve to encourage their resistance to the grant of full equal access and (2) cause them to redouble their efforts to nibble incessantly at the edges of the restrictions, in the expectation that this would result in their complete entry into the prohibited markets. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 867–68 (D.D.C.1984); *see also* Reply of Competitive Telecommunications Association at 5–8. In fact, executives of and spokesmen for the various Regional Companies rarely miss an opportunity to explain their desire, nay their right, to operate interexchange networks, and the groundwork for such expansion is laid whenever and wherever possible. *See, e.g.*, statement of Thomas E. Bolger, Chairman of Bell Atlantic, *Washington Post*, December 30, 1985, Business Section at 1. The uncertainty, turmoil, and confusion that would be created in the telecommunications industry by implementation of the Department's recommendation are as undesirable as they are unnecessary.

Third. As stated above, the Court has for some time sought to find means for phasing out or reducing its "oversight" responsibilities consistently with its responsibilities under the decree.[86] Several of the decisions made today are steps in that direction. *See* Parts VIII and IX, *infra*. However, if the Department's recommendations were adopted, the Court would become involved in detailed regulation of the Regional Companies with a vengeance.

The Court would be constantly reviewing requests for removal of interexchange and information services restrictions on a state-by-state, possibly county-by-county, basis, in order to determine whether local regulation had changed sufficiently to allow such removals in the particular area. In order to carry out that responsibility, the Court would have to review and to scrutinize, on an ongoing and unending basis, the effect, and possibly the purpose, of old and new state and local regulation of telecommunications providers all over the United States.[87] It is difficult to imagine a more systematic and offensive intrusion into local affairs, and on this basis, one intervenor aptly describes the Department of Justice proposal as "an affront to federalism." CP National Corporation Comments at 6.

The task prescribed by the Department of Justice is one that a federal court should undertake, if at all, only if that is absolutely essental for the protection of federal constitutional or other legal rights. Clearly, that is not the situation here, and the Court accordingly declines to enter that thicket.

For these reasons, the Court will not entertain applications for waivers that are predicated only upon changes in state or

86. *See, e.g., Western Electric Co.*, 592 F.Supp. at 873–75 (establishing procedure whereby Department of Justice reviews requests for waivers of line of business restrictions).

87. One example is cited by the Utilities and Transportation Commission of the State of Washington which points out that it has permitted local resale and shared tenant services but not the provision of basic local service by more than one telephone company in the same territory, adding, "[i]s the Department suggesting that the Court interpret state law to determine whether the Washington situation is a legally protected monopoly?" Comments at 16.

See also Department of Justice Report at 166; Response at 9, 99.

The protection of consumers is a foremost objective of the antitrust laws, and their protection was a prime objective of this lawsuit when it was brought and prosecuted by the Department of Justice for a number of years. The Court continues to regard consumer protection as such an objective.[267]

[13] Second. A related issue is that of the relevance of the goal of universal telephone service. There, too, inconsistencies abound. The Department contends that the decree restrictions may not be maintained to further the universal service goal. Response at 13. Yet Ameritech, its ally on these issues, chastizes the Department for proposing conditions respecting only partial removal of the interexchange restriction on the ground, *inter alia*, that this would "interfere with legitimate social objectives, such as universal service." Comments at 56.

Universal service has been explicitly declared by the Congress to be a paramount national objective,[268] and the courts may be expected to avoid taking actions, if that can legitimately be done, that are inconsistent with this objective.

Whatever others may do,[269] the Court will continue to decline to regard divestiture as an end in itself, as a mere deregulatory gesture for the sake of deregulation. Divestiture and the line of business restrictions have as their basic purpose the removal of anticompetitive impediments, to the end that the rates consumers must pay will be reasonable and unimpeded by unfair competition, and that all segments of society, including the poor, the old, the infirm, and those living in isolated rural areas will in consequence have access to necessary telephone service. That is consistent with the basic purposes of the antitrust laws—purposes that the Court expects to continue to respect.

[14] Third. Insofar as, more specifically, the information services restriction is concerned, in addition to the competitive concerns discussed in Part V, *supra*, that stand squarely in the way of a removal of that restriction, and that alone and without more justify its retention, there is also the threat such removal would pose to First Amendment values that would lead to the same result.

It is a purpose of the First Amendment to achieve "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). The diversity principle has been repeatedly recognized by the Supreme Court.[270] Considera-

267. As indicated above, the Court's decisions on the core restrictions do not turn on the factors of protection of ratepayers from price gouging or that of universal service. But there should be no misunderstanding regarding the continuing relevance of congressionally-mandated policies. *See also AT & T*, 552 F.Supp. at 149–51.

268. 47 U.S.C. § 151. The Department of Justice repeatedly contends that its proposed removal of the restrictions would not intrude on the regulatory authority of the states. Report at 102. Yet it is noteworthy that the states are making every effort to keep rates for the consumers low so as to foster universal service, *see, e.g.*, Comments of Washington Utilities and Transportation Commission at 9; Comments of the Public Service Commission of Wisconsin at 2–3; an objective that would be undercut by a removal of the core restrictions. The state commissioners are divided on the question of the removal of the restrictions but not on the issue of universal service.

269. *AT & T*, 552 F.Supp. at 224. The Regional Companies did not utter any complaint that this decree interest in affordable local rates involved the consideration of improper factors, nor have they expressed any adverse reaction to the Court's action since that time. Again, there was no objection from these companies when the Court noted in 1983 that, in taking action favorable to the Regional Companies with respect to such matters as the Bell name and logo and the availability of Bell System patents, it considered, among other factors, the protection of the principle of universal telephone service. *Western Electric Co.*, 569 F.Supp. at 1091, 1120–21. And of course none of the companies is offering to relinquish those benefits.

270. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795, 98 S.Ct. 2096, 2112, 56 L.Ed.2d 697 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 1806, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *United States v.*

In order to facilitate the growth of a "truly competitive telecommunications industry," the Court therefore approved the proposed decree language prohibiting the Regional Companies from entering the interexchange services market [78] as an integral and vital part of the prophylactic remedy represented by the decree. It is that prohibition that is now again before the Court on the basis of requests for its removal.

B. *Original Department of Justice Proposal*

In its Report submitted on February 2, 1987, the Department of Justice, in addition to recommending removal of the restriction on mobile interexchange services (*see* Subpart F, *infra*), advocated that the basic interexchange restriction embodied in section II(D)(1) of the decree be sharply cut back. Instead of being prohibited from engaging in interexchange services, each Regional Company would be authorized to render all such services, with the exception only of those interexchange calls that originated or terminated in an area in which the particular company had a legally protected monopoly. Department of Justice Report at 59, 68–76.[79] The Regional Companies by and large initially supported this approach, albeit with substantial modifications.

However, following its study of the comments its proposal had generated,[80] the Department reversed its field. Its subsequent submissions to the Court concluded both that the Regional Companies retained the ability to use their control of the monopoly bottlenecks to impair interexchange competition, and that the in-region out-of-region proposal itself presented insuperable practical difficulties. Accordingly, the Department withdrew that proposal. Response of the United States at 24–28. The Court agrees with both prongs of the Department's present position.

The bottleneck control issue is discussed at some length in Part II of this Opinion, and no purpose would be served by a detailed reiteration of that discussion here. Suffice it only to say once again that the monopoly bottlenecks continue to exist essentially in unchanged scope and form, and that they continue to provide the same basis for anticompetitive activity as they did prior to the Bell System break-up.[81] It is worthwhile, however, to describe briefly the basis for the Court's conclusion, paralleling that of the Department, that it is not practical to lift part of the interexchange restriction so as to permit each Regional Company to offer interexchange services outside but not inside its own region.

The plain and universally recognized fact is that the market for interexchange services is national. Because of that overriding fact, it is unlikely in the extreme that a Regional Company could compete successfully with other interexchange companies (or even exist in the interexchange market) if, unlike its competitors, it were able to offer service in only parts of the country.[82]

78. The Court also concluded that the Regional Companies would have substantial incentives to subvert the decree's equal access requirements because they would "stand to gain business if other carriers were disadvantaged by poor access arrangements and high tariffs." *AT & T*, 552 F.Supp. at 188.

79. The Department reasoned that the bottleneck monopoly power could not be effective if the company vested with that power operated only outside its own region, and it further concluded that any concern existing at the time of divestiture that the Regional Companies would operate as a unified group of local exchange monopolies "has proved unfounded." Report at 74. The Department also stated that the opportunities for cross-subsidization would be limited because the likely geographic separation of facilities and personnel would permit detection of any attempts at such cross-subsidization. Report at 76.

80. Of the seventy entities that addressed the Department of Justice proposal, only two supported it completely.

81. As National Telecommunications Network (NTN) correctly states, "[f]or example, if Pacific Telesis were permitted to compete with NTN to sell private lines in the eastern United States, it would have an incentive to give NTN inferior access to points in the Pacific Telesis region, and so damage NTN's reputation in the industry for service reliability and other considerations." Comments at 16.

82. Few, if any, individuals would subscribe to or use U S West, for example, if they could not use that company's long distance service for

of this nation in that regard, in that the telecommunications equipment market—like the television and automobile markets today—will increasingly become the preserve of foreign-dominated firms. *See* pp. 561–65, *supra*. The Regional Companies, once again, argue that this is not a matter for judicial concern; yet these same companies have loudly advocated in many forums, including this Court, Bell Atlantic Comments at 5, that the decree stands in the way of an improved American international trade position.[274] The companies' position that the Court may not consider the probable deleterious effect of a restriction removal on American foreign trade is not only bad policy; it is also bad law. *See United States v. United States Steel*, 251 U.S. 417, 457, 40 S.Ct. 293, 301, 64 L.Ed. 343 (1920); *FTC v. Great Lakes Chemical Corp.*, 528 F.Supp. 84, 98 (N.D.Ill.1981); *United States v. LTV Corp.*, 1984–2 Trade Cas. 66,133 (D.D.C.), *appeal dismissed*, 746 F.2d 51 (D.C.Cir.1984).

Fifth. Although the Department of Justice insists that the Court's inquiry must be restricted to competitive injury to the exclusion of all other factors, it does find a cost-benefit standard in section VIII(C) of the decree, when that supports its position. *See, e.g.*, Department of Justice Report at 46. The Court has considered costs versus benefits where this can appropriately be done without undue risk to competitive considerations. *See* Part VIII (information transmission) and Part IX (catch-all restriction) *infra*.

VIII

Transmission of Information Services

Although the Court is denying the requests for removal of the information services restriction insofar as they relate to the provision of information content (Part V, *supra*), a separate analysis is required to determine whether so much of that restriction should be lifted as to enable the Regional Companies to acquire and operate the infrastructure necessary for the transmission of information services generated by others.[275] Before considering the competitive issues raised by that suggestion, it is useful to describe first what such action would mean in practical terms.

A. *Videotex Industry*

The term "videotex" refers to a wide variety of easy-to-use interactive data services. "Videotex arranges information in a text or graphic format on a video display with user input through a keyboard." Huber Report at 1.29 n. 46. Videotex applications cover an entire spectrum of services, ranging from mere database access to such sophisticated services as teleshopping, electronic banking, order entry, and electronic mail. *Id.*

The videotex industry has grown slowly in the United States, particularly with respect to the home videotex market, and consumer-oriented videotex services on a substantial scale remain largely in the future. Several efforts to provide videotex services have failed. In March 1986, Knight-Ridder Newspaper Inc.'s Viewtron service, which provided home subscribers in several markets with news, stock prices, and shopping information, folded without having made a profit. Around the same time, the Times Mirror Company's Gateway videotex services closed down after losing approximately $30 million. *Washington*

274. The Regional Companies' stance is wrong even in that respect. The Court has not denied a single waiver request for international operations. To be sure, the Regional Companies are precluded by section II(D)(2) of the decree from manufacturing telecommunications equipment but, as shown at pp. 560–61, *supra*, American telecommunications manufacturing is stronger today than it was under the monopoly conditions to which the Regional Companies want to return.

275. Among those who have requested such relief are U S West and Videotex Industry Association. Some intervenors argue that the decree even now permits the Regional Companies to transmit information services. However, in view of the breadth of the information services definition in section IV(J) of the decree, and the inclusion therein of such terms as "acquiring," "transforming," "processing," "utilizing," and "making available," that construction must be rejected. Moreover, as will be seen below, the transmission of such services actually involves the performance of a number of services that by any fair reading of the term "information services" would be included in that definition.

exchange telecommunications" is defined as "telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." *AT & T*, 552 F.Supp. at 229. "Exchange areas," for purposes of the decree, are the Local Access Transport Areas (LATAs), established by the individual Regional Companies with the approval of the Court, *AT & T*, 552 F.Supp. at 229, each of the LATAs encompassing "one or more contiguous local exchange areas serving common social, economic, or other purposes." *Id.* Loosely speaking, interexchange service may be equated with long distance service (although some long distance service occurs within a LATA and is therefore not interexchange service within the meaning of the decree).

The factual predicate for the interexchange restriction was the large volume of evidence presented at the trial demonstrating that (1) the local exchange facilities operated for the Bell System by its twenty-two Operating Companies were essential for any firm that desired to provide long distance service, because without interconnection with the Operating Companies' switches and circuits it had no means of reaching the ultimate customer, the local possessor of a telephone instrument, and (2) the Bell System, through the Operating Companies, had consistently sought, often successfully, to exclude competition in the provision of long distance service by restricting interconnection to these local facilities. *AT & T*, 552 F.Supp. at 161–62; *AT & T*, 524 F.Supp. at 1358–57.

More specifically, the evidence indicated that the Bell System's refusal to provide local interconnection to its long distance competitors, such as MCI, on fair and nondiscriminatory terms and conditions, and its manipulation of the exchange access and of the tariff system,[70] precluded meaningful competition in the provision of long distance services. *AT & T*, 552 F.Supp. at 160–63; *AT & T*, 524 F.Supp. at 1358. To put it more directly, the Bell System managed for several decades by a variety of means to stave off significant competition in the long distance market, and to that effort the local Operating Companies and the monopolies they represented were the key component. All of this was done to protect the Bell System's own long distance component—the Long Lines—from outside competition.

In determining what remedy would most effectively protect in the future against similar anticompetitive abuses, both the parties and the Court carefully considered and rejected the alternative of improved FCC regulation. As explained elsewhere herein, federal and state regulation had simply not been capable of preventing the antitrust problems that the decree was to resolve. The Department of Justice argued, and introduced extensive evidence to prove, that the local exchanges are so complex, so technologically dynamic, and characterized by such vast joint and common costs that no set of regulations could realistically prevent competitive abuses. It also appeared that when the FCC did act, its efforts were largely unsuccessful.

For example, the trial record shows that, despite FCC orders to do so entered in 1971,[71] in 1973,[72] and in 1974,[73] the Operat-

others. They are not limited to transmission, but in certain contexts include related activities such as interexchange traffic routing, the selection of interexchange carriers through least-cost routing or shared tenant services systems, and the marketing of the services of interexchange carriers. *United States v. Western Electric Co.*, 627 F.Supp. 1090, 1099–1103 (D.D.C.), *aff'd in part and rev'd in part*, 797 F.2d 1082 (D.C.Cir. 1986).

70. Tariffs filed with the FCC became effective at once or within a brief period of time of their filing by the carrier, and they are deemed to have, in effect, the force of law. So many telephone tariffs were and are being filed that the Commission frequently has no time or opportunity to review them in any detail, if at all. Even when they are reviewed and found wanting, the Commission can usually do no more than to suspend them for a brief period. Telephone companies can, and frequently do, file new tariffs just as quickly as old ones are questioned, and the result is that regulatory oversight is in practice often slight.

71. *Specialized Common Carriers Services*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington*

trols the Teletel system through the DGT, and it also subsidizes the system by giving away the Minitels free to all households.[285]

Videotex is also available, but on a much more limited scale, in Japan and, to some extent, in Great Britain.[286] The Japanese telephone company functions as a hardware-software vendor to a number of local emergency medical information systems that monitor, among other things, the availability of hospital beds and blood and serum inventories. Huber Report at 1.29 n. 47, Table G.18. The Japanese Automated Meterological Data Acquisition System collects weather data continuously from 1,400 reporting stations, Huber Report at Table G.18; a voice-mail system was instituted in Japan late in 1986, Bell Atlantic Comments at 54 n. 113; and Nippon Telephone & Telegraph makes available to customers a number of dial-up services, including news, weather, golf and ski conditions, travel, insurance, taxis, hotels, cooking, music, and English-language services. Huber Report at Table IS.21. Like the French company, the Japanese telephone company functions essentially only as a supplier of conduit, not of content.[287]

C. *Importance of Widely-Available Information Services*

As indicated, no videotex service on a similar scale exists in the United States. Before inquiring into the reasons therefor and into practical means for remedying the relative scarcity of such services without at the same time creating the risk of anticompetitive actions, it is appropriate to consider first whether and why the wide availability of information services through videotex might be beneficial.

It is a cliché to state that we live in an Information Age, but it is also true. Information is today as central to the service economy which increasingly prevails in this country as iron and coal were to England around the turn of the century. Whatever causes the more efficient, rapid, inexpensive dissemination of specifically needed and requested information[288] to all segments of the population, is likely to give this nation and its economy a significant advantage over countries not similarly equipped. More specifically, affordable videotex—the instantaneous availability to millions of Americans of needed information at low cost—could be expected to benefit the economy by providing increases in efficiency in information management and hence also in productivity. Outside the economic realm, broad and relatively inexpensive videotex would, of course, offer significant social benefits.

Without attempting to be exhaustive, the following lists some of the more obvious videotex-related economic services that exist elsewhere and that might be made available in this country: (1) in banking, videotex could give customers direct and immediate account information and fund transfer capability; (2) in brokerage, there could be instant evaluation of current portfolios and access to alternative investment opportunities; (3) with respect to customer service by a variety of business enterprises, arrangements could be made for immediate access to information about outstanding balances, order fulfillment, accrued interest, and the like; and (4) with respect to shopping services, videotex could provide direct and immediate access to the prices and descriptions of a wide range of prod-

285. According to reports, albeit from interested parties, there is no governmental subsidy for the French Teletel service, as the French telephone company expects to recoup its entire investment by 1990 or 1991. Presentation of Intelmatique, U S West Reply, App. Tab 2, at p. 5.

286. ANPA Comments at 16 (*citing* Department of Justice press release, at 9–10 (February 12, 1987)).

287. Reply Comments of ANPA at 7.

288. The United States of course does not suffer from a paucity of information. Newspapers, television and radio stations and networks, cable services, magazines, libraries, and other information sources exist in number and quality unmatched elsewhere. Videotex would fill a distinct niche, however, in that it would enable a participant to acquire specific information at a time when he needs or wants it, and it would permit him to do so without time-consuming, difficult research efforts.

Some of the Regional Companies, while conceding that residential and small business users cannot do without the Regional Company monopoly bottlenecks, assert that this is not true with respect to the large users.[57] As the Huber Report conclusively demonstrates, however, that is just not so. The Report notes that even very large private network customers still employ far more switched (*i.e.*, Regional Company) access lines than dedicated (*i.e.*, private) access lines. Huber Report at 3.44–3.46. As the Report further found:

> Users' requirements for a bundle of local and interexchange services can make any discrete focus on alternative high capacity systems misleading. *Control over a single, essential piece of network, even a seemingly small and comparatively inexpensive one ... may give LEC's [i.e., Regional Companies] 'account control,'* that is a guaranteed foot in the door with large customers, a window on their business, and the power to insist on dealing directly with them (emphasis added.)

Huber Report at 3.45. And Dr. Huber further concluded that fully forty to fifty percent of large business customers' payments for private networks are attributable to access provided by Regional Companies. Report at 3.46–3.49, Figure IX.30, Table IX.31.

To be sure, the Department of Justice and Dr. Huber refer at some length to technological developments,[58] particularly the emergence of a geodesic network.[59] However, they both acknowledge—as they must—that the geodesic network does not now exist, and that all these developments will, if ever,[60] impact the Regional Companies bottleneck control only in the future.[61] Department of Justice Report at 42–43; Huber Report at 2.23, 2.25–26.[62] Indeed, the Department relies on Huber's conclusion on the dispersal of electronic intelligence only for the proposition that it would support many interconnected, vertically integrated providers. *Id.* at 1.6–1.7, 1.30.

57. *See, e.g.*, BellSouth Comments at 37–38; Bell Atlantic Comments at 10–13.

58. The broadening consumption of electronic equipment, for example, does not reduce the need for Regional Company transmission services; it may actually increase it. *See* Comments of Independent Data Communications Manufacturers Association, at 18–19.

59. These technological developments form the basis for Dr. Huber's conclusion that the exchange network is being transformed from a "pyramid" to a "geodesic" network. Huber Report at 1.2, 1.6. According to Dr. Huber, in a pyramid network, there are relatively few switches that are arranged in a vertical hierarchy. This vertical switching network was predicated on the allegedly earlier economic reality that switching was very expensive relative to transmission, and the local Operating Companies had a bottleneck monopoly over entry into the network because they controlled the gateway switches. In a geodesic network, according to Dr. Huber, the number of switches and connections between them are much greater, and consequently the processing and control functions are decentralized. Dr. Huber accordingly concluded that transformation to geodesic networks will be due to the decrease in costs of switching and processing brought about by technological innovation. Huber Report at 1.2–1.6. A geodesic network erodes bottleneck control, he contends, because, in contrast to the pyramid which could support only a single integrated provider of telecommunications services, it can

60. AT & T challenges the very premise of Dr. Huber's geodesic network theory, claiming that it rests on a misunderstanding of principles of engineering and network design so basic that they were stipulated to by the parties to the *AT & T* case. AT & T Comments at 50–51 n. *. Since it is clear, as stated *infra*, that, whatever may be its future, the geodesic network does not exist *now*, it is not necessary to resolve that dispute.

61. It is thus ingenuous to speak of the geodesic network as if it existed at the present time. *See, e.g.*, Response of NYNEX at 14 ("Thus, as Dr. Huber notes, 'the geodesic network *is* structurally competitive'" (emphasis added)). No such statement can be found at the page cited.

62. An analysis conducted by experts in telecommunications economics and regulation for Economics and Technology, Inc., and submitted to the Court by the Ad Hoc Telecommunications Users Committee and the International Communications Association, likewise concludes that "the geodesic model that Dr. Huber has envisioned does not now characterize the U.S. telecommunications system, nor will it do so in the foreseeable future." Analysis at 11. The study also reports that virtually all the available information indicates that business tones are not more likely to be generated by PBXs than by Regional Company central office switches. Analysis at 36–40.

whether information services would be accepted by both providers and consumers on a sufficient scale to render it economically feasible as well as socially useful.[296] Indeed, no one could ever know the answer to these questions unless legal obstacles to the provision of the services are removed.

After considering the subject in some detail and with great care, the Court has become convinced, first, that, if the authority of the Regional Companies is carefully limited, the risk of anticompetitive action by these companies, while not insignificant, is, on balance, outweighed by other considerations (*see infra*); second, that the broad scale and the reasonable cost criteria necessary for a successful system can be met only by permitting the Regional Companies to provide the necessary infrastructure components for efficient videotex services on an integrated basis;[297] and third, that it is probable that a well-run, adequately publicized system could perform a useful service, and that it might attract a sufficient number of subscribers so that it could operate on an economically sound basis.[298]

E. *An Economically Sound System*

If the Regional Companies operated the key infrastructure components, the expense associated with the provision of videotex could be reduced substantially and the services themselves would be more readily accessible. *See* Affidavit of Dr. Almarin Phillips submitted on behalf of U S West; Affidavit of Professor Jerry A. Hausman on behalf of Pacific Telesis. More specifically, the data indicate that Regional Company ownership of "gateway" facilities similar to French VAPs would decrease the cost of providing videotex.

Gateways[299] would permit the conversion of the asynchronous signals that an inexpensive "dumb" terminal sends and receives to more efficient X.25 packet signals. Since asynchronous transmission is much more expensive and much slower than X.25 packet transmission, wide dispersion of the gateways would decrease the duration of asynchronous transmission and hence overall transmission costs. Such a reduction in transmission costs may be expected also to reduce substantially the cost of the videotex service to the consumer, and the increased demand generated thereby presumably would, in turn, increase the number of information voices available to the public.[300]

Possible alternatives are not similarly attractive. If the gateways did not perform these conversion functions, they would have to be performed either by the individual terminals or by the various providers of information. Conversion by the terminals would necessarily increase significantly the required sophistication and consequently the cost of these terminals. If prospective

296. American Newspaper Publishers Association believes that such services have blossomed whenever one or more of the following factors has generated a willingness by the market to pay for the service: (1) a need for highly current information; (2) a need for automated, intensive searches among large amounts of indexed material; and (3) a need to manipulate information, mathematically or otherwise, as well as to obtain information. Comments at 21.

297. The ability of the Regional Companies to engage in low-level network functions on an integrated basis, such as those described below, would result in more efficient provision of those services by decreasing the cost and increasing the accessibility of those services. This, in turn, could foster a mass market for videotex services.

298. The consensus to that effect reaches all the way from U S West, a Regional Company, to the American Newspaper Publishers Association, a publishing association.

Not everyone agrees, of course. For example, ADAPSO states that the French experience is meaningless in American terms, and that the United States has even now the world's largest, most successful, most sophisticated information services industry. Comments at 46–48. Whether or not that assessment is correct—and this depends primarily upon what is being counted and how—there would appear to be no question that more efficient distribution of the services would significantly increase their availability and hence their usefulness.

299. As used herein, the term "gateways" is limited to facilities, similar to the French VAPs, that are described below. It does not include other facilities that under other circumstances may be included within the meaning of that term.

300. If the network itself performed certain gateway services, even small data base providers could afford to compete in the information services market.

that question unequivocally in the affirmative.[44]

[5] First. Most of the Regional Companies contend that they do not retain their monopoly power over the local bottlenecks. For example, U S West argues that it lacks bottleneck monopoly power because there now exists substantial consumer bypass.[45] Ameritech goes to some lengths to attempt to demonstrate that competition has reduced the Regional Companies' market power: it points to the existence of competitive alternatives for the switching and privatization of telecommunications systems, end user purchase of switches, and a diminished pool of monopoly revenues for subsidizing competitive products and services.[46] Ameritech Comments at 12–14; *see also* Bell Atlantic Comments at 12–14; BellSouth Comments at 37–38; and U S West Comments at 40–41.[47]

There is no basis for any of these claims, and no serious effort is made to undermine Dr. Huber's findings to the contrary. Almost all the parties and intervenors other than the Regional Companies themselves acknowledge the continued existence of Regional Company monopoly power.[48] The Department of Justice, for example, does not urge removal of the restrictions on the ground that the local exchange has lost its bottleneck characteristics; to the contrary, it concedes that the exchange services continue to be monopolies, and that the Regional Companies continue to retain their monopoly power over "the local exchange bottleneck."[49] As explained *infra*, these assessments are correct; the Regional Companies do retain that power over the local bottlenecks, and there is little "bypass" of their switches and circuits.

The exchange monopoly of the Regional Companies has continued because it is a natural monopoly.[50] Local exchange com-

44. In making this and other determinations, the Court has fully considered the legal and factual submissions of the parties and intervenors. On the facts, it necessarily relied to a considerable extent upon Dr. Huber's excellent and thorough study, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, although it did not agree with all of his conclusions. However, other expert opinions have also been considered, the weight being given to them obviously depending upon such factors as the specific knowledge of the particular individual and the detailed or conclusory character of the affidavits and other papers, as the case may be.

Consideration of the affidavits and other materials revealed differences in emphasis and even differences in ultimate opinions, but on most issues critical to the Court's decisions there is a surprising amount of agreement on the actual facts, as distinguished from argument or conclusions drawn from the facts.

No party or intervenor has suggested that a formal evidentiary hearing be held—quite the contrary, *see, e.g.*, US West Reply Memorandum at 6 n. 3—and in this proceeding, which in a sense is a continuation of the Tunney Act proceeding, and which involves some 175 different parties and intervenors, with a wide variety of interests for possible examination and cross-examination purposes, that would in any event have been both inappropriate and impractical.

45. Memorandum of April 27, 1987 at 139–43. Bypass is deemed to exist when a telephone customer is able to reach those with whom he wishes to communicate without the use of the facilities of a Regional Company or its equivalent in the territories serviced by independents. All of these local facilities, both those of the Regional Companies and those of the independents, are encompassed in the general term "local exchange carrier," or LEC.

46. As shown in Part VII–A–2, *infra*, statistics indicate that the Regional Companies have probably subsidized their competitive ventures with monopoly revenues even in the three years since divestiture, and even though their entry into competitive businesses has thus far been necessarily relatively small.

47. U S West's report on bypass (Appendix Tab 31) is forced to recognize, however, that those whom it regards as bypassing the Regional Companies are using those companies as the "pipe through which data or voice is transmitted" (p. 5), and that even the traffic of a customer who has aggregated his traffic and uses PBX switching systems is carried over "relatively few" Regional Company access lines (p. 68). *See also* pp. 538–39, *infra*.

48. Even some of the Regional Companies do on occasion concede the existence of such power. Ameritech Response at 10–11; Pacific Telesis Further Comments at 15–16, 29; Southwestern Bell Response at 9.

49. Department of Justice Response at 15; *see also* letter dated October 2, 1986, from then Assistant Attorney General Douglas H. Ginsburg to Representative John D. Dingell, Chairman, House Committee on Energy and Commerce, at 12.

50. *See* Hearing before the Senate Committee on Science and Transportation, 97th Cong., 2d Sess.

tion sent or received, and neither requires a specific amendment of the decree, or poses a threat to competitive parity.

The generation of characters that appear on the terminal screen constitutes an echoing of consumer-generated keystrokes for the purpose of confirming successful reception as part of the transmission function. Although it is asserted by some that provision of this type of service could affect the content of the information sent or received —for example when the format of the information provider's computer application, which uses color as a necessary component to the interpretation of the message sent, is changed so that the receiving terminal, which has only a "highlight" and "shade" capability and no color capability, can receive that message in a meaningful manner—the degree to which such a transaformation could affect content is insubstantial. In the judgment of the Court, performance of this function by the Regional Companies will not create any significant opportunities for anticompetitive conduct.

If the Regional Companies are permitted to provide these services, much of the need for sophisticated hardware and software at the user's end of the system otherwise necessary for the achievement of access to information services would be obviated: the network itself would be performing functions otherwise performed by the user's more sophisticated computer.

2. *Address Translation*

Through address translation, the consumer will be enabled to use an abbreviated code or signal provided to him in order to access the information service provider in lieu of dialing the telephone number of the desired provider.[307] Translation of the consumer's request for service in this manner would obviously facilitate accessibility of the system. Performance of this function by the Regional Companies likewise involves only a minimal manipulation of content, and it, too, poses no significant risk of anticompetitive conduct.[308]

3. *Protocol Conversion*

Protocol conversion facilities undertake electronic translation in order to facilitate the communication between information service providers. They perform this task by altering and reconfiguring message content at the machine level, for example, by converting the asynchronous signals that a "dumb" terminal sends and receives to the more efficient X.25 packet signals. Protocol conversion services are essential, low-level network support systems. Huber Report at Table IS.10.

Provision of these conversion functions by the Regional Companies is necessary to take advantage of the decreased transmission costs described above. As there noted, independent providers would not have the incentive to disperse the conversion facilities on a wide basis since such dispersion would increase their packet switched transmission costs.[309]

Protocol conversion, then, is a key infrastructure component necessary to the development of a mass-market for videotex. Some simple forms of protocol processing do not involve any changes in form or content of the information sent, and their performance by the Regional Companies poses no risk whatever. However, a sophisticated and effective system of information transmission requires also that the network perform those protocol conversion

307. In the French VAP, this service consists of the translation of a mnemonic code into the telephone number of the desired information service provider.

308. While it has been argued by some that the Regional Companies are entitled to provide this service even now under the decree as part of the permissible "forwarding or routing" functions of "information access," *see* section IV(I) of the decree, the Court has concluded otherwise, particularly since section IV(F) prohibits interexchange routing. Accordingly, the legality of the performance of this function will require an appropriate amendment of the decree. In any event, provision of this service by the Regional Companies, in conjunction with the other infrastructure components described herein, is a necessary component in the provision of an impetus for growth of a mass-market for videotex services.

309. Limited dispersion would not only preclude the possibility of decreased transmission costs, but it would also constrict the transparency of communication between the consumers and providers.

ers, U S West also insists upon treating the current proceeding as if it were a new antitrust action in which no judgment had ever been entered.[36]

[3] In view of the fact that what is before the Court is not a new antitrust suit in which the plaintiff would have the burden of proof, but requests for changes in a decree that became final several years ago, these contentions can only be characterized as frivolous. It is plain that collateral attacks on such a decree are inconsistent with the law of the case rule,[37] and equally plain that section VIII(C) does not require full-fledging proof of a new "antitrust injury," but that it speaks only of a "substantial possibility" that a Regional Company "could" impede competition.

More fundamentally, there is not the slighest indication in the record surrounding the negotiation or the approval of the consent decree that, absent the most substantial alteration of market conditions, a judgment that was to end over thirty years of strife in the telecommunications industry and to establish new conditions to govern that industry thereafter, was to be dissolved with respect to one of its two critical elements immediately or almost immediately after entry.[38]

The Department of Justice goes to some lengths to refute AT & T's point that it agreed to the decree so as to prevent litigation and other controversies regarding the leveraging of the monopoly power, and that the Court should not unnecessarily cause the revival of such controversies.[39] In one sense, the Department is entirely correct. Restrictions may not be maintained solely or at all to avoid controversy.

However, the Court cannot help but reflect that one significant reason for the Bell System's agreement to enter into the consent decree was its weariness with constant controversy in the courts, the Congress, before the FCC, and before local regulators, and its willingness to trade those controversies about monopoly bottlenecks for an ability to compete in the interexchange and manufacturing markets without being burdened with the very kind of competition from monopolists that it was just abandoning. *See, e.g.*, AT & T Comments at 7–8; Coll, *The Deal of the Century*, at 300–02. The Bell System could not know, and surely did not expect, that the word of the United States Department of Justice would be good only for as long as

"must make a showing" because, it is claimed, the provision applies only to "the petitioning BOC," not the Department. Even the Department of Justice does not make such a claim. In any event, if the language relied on by BellSouth does not apply to the Department of Justice, that Department may petition for a change in the decree only under the more rigid *Swift* standard.

36. US West Reply Memorandum at 1–17.

37. *DeTenorio v. Lightsey*, 589 F.2d 911 (5th Cir. 1979); *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788 (1981). As MCI aptly observes (Reply at 5):

> The fundamental unfairness of the Department's and Regional Companies' efforts to relitigate principles already finally resolved in this case might be more apparent if AT & T or MCI responded with a list of all those rulings they found disappointing and wished to relitigate at this time as well. MCI, at least, would be pleased to ask the Court's reconsideration of a range of rulings beginning with the size of the LATAs (*see United States v. Western Electric Co.*, 569 F.Supp. 990, 1003–1008 (D.D.C.1983)), and ending with NYNEX's acquisition of a conditional interest in Tel-Optik (*see United States v. Western Electric Co.*, Civil Action No. 82-0192 (D.D.C. Aug. 2, 1986)) [Available on WESTLAW, DCT database]. But even when limited to issues that have not previously been resolved, this proceeding is sufficiently complex.

38. Claims to the contrary—that the restrictions were justified or intended to apply only immediately after divestiture, *see, e.g.*, Southwestern Bell Comments at 2; FCC Comments at 4—are so devoid of legal and factual support that, were it not for the fact that there appears to be no practical way to sort out a few statements out of many, and the further fact that several assertions by others are likewise close to or below the acceptable line, sanctions under Rule 11, Fed.R.Civ.P., would have been imposed. *See also Western Electric Co.*, 569 F.Supp. at 1090 n. 139, where the Court referred to the successful invocation of section VIII(C) as "an event, if ever" it should come to pass.

39. Department of Justice Response at 20–23.

ty to engage in anticompetitive behavior, this introductory content must be strictly limited to (1) the display of a welcoming page and (2) provider listings.

A welcoming page could advise the consumer of the billing arrangement that was established for a particular information service, and it would provide for the prompt entry of the code or the name of the desired information service provider. Neither of these should cause any competitive problems.

A provider listing could, for example, contain in addition to the providers' names, addresses, and telephone numbers, their business, product, or service categories. With this information as a database, the Regional Companies could establish systems which would allow the consumer to search in any of these categories. The companies might wish also to cross-reference the names of the providers, their codes, and the like. Such a cross-reference would not only give broader exposure to the various available providers but it would also facilitate consumer access to the services.

However, service menus, which some of the Regional Companies are seeking, are in a different category. Menus of information services and options within those services are the essential means for navigating about that system, that is, for directing the consumer in its use, such as in obtaining or transmitting the desired information or in performing certain transactions. Menus are a matter of editorial control, specifically tailored by the particular information provider, and as such they tend to be closely interrelated with information content. If the Regional Companies could furnish such menus, there would be a breach in the boundary between information services needed for transmission that only insignificantly affect content, and those that do constitute content and accordingly establish opportunities for anticompetitive conduct. On this basis, the provision of the menu service cannot be permitted consistently with the basic structure and purposes of the decree.

G. *Electronic Directory Service*

Several intervenors claim that the provision of electronic directory services by the Regional Companies is a necessary component of the infrastructure, and that it, too, should be permitted.[311]

The basic rationale advanced in support of this assertion is that the consumers will become better acquainted with videotex services generally through use of the electronic directories. That rationale, while it does contain a grain of truth, is not adequate to support removal of the information services restriction with respect to the provision of electronic directory services generally.

The Regional Companies are currently permitted to compile and distribute "Yellow Pages" directories. If they were also allowed to provide their electronic counterpart, they would plainly have the incentive and ability to discriminate both against competing providers of directory services and against the publishers of classified and other advertisements.[312]

As the Court indicated in 1982, with respect to the prohibition on electronic publishing by AT & T, it is too easy and too tempting for a company engaged in both the generation of information, whether political or commercial, and its transmission, to discriminate against competitors who lack the ability to exercise the transmission function. In view of the time-sensitive nature of most such material, discrimination activity by a Regional Company could profitably include the practice of giving priority to its own publishings, and that of using for its own ends information learned in the

311. *See, e.g.*, VIA Comments at 10.

312. Yellow Page-type advertisements transmitted and published electronically could easily be updated weekly or even daily, and on this basis they could and no doubt quickly would compete directly and on favorable terms both with current-type newspaper advertisements, and with those who would use the new information network to publish their own electronic advertisements. Although, for the reasons stated, Regional Companies cannot be permitted to enter this market, there is no reason why others—whether or not they are now in the publishing business—could not do so.

of anticompetitive activities by those in control of those monopolies.[23]

In its Opinion explaining the decree,[24] the Court stated that proceedings addressing the continuing viability of the line of business restrictions

> should be governed by the same standard which the Court has applied in determining whether [the restrictions] are required in the first instance. Thus, a restriction will be removed upon a showing that there is no substantial possibility that an Operating Company could use its monopoly power to impede competition in the relevant market.

AT & T, 552 F.Supp. at 195 (footnote omitted).

The rationale for a particular restriction may cease to provide a sufficient basis for continued application of that restriction, if, as the Court stated in 1982, the Regional Companies lost their "ability to leverage their monopoly power into the competitive markets from which they must now be barred." *Id.* at 194. It was anticipated that this would occur when technological developments eliminated the Regional Companies' local exchange monopolies or when substantial changes occurred in the structures of the competitive markets. The Court observed that, upon the happening of such events, the need for the restrictions might be fundamentally undermined. *Id. Accord*, 592 F.Supp. at 858–59, 868; 627 F.Supp. 1090, 1098 n. 26 (D.D.C.1986).

[1] It is important, however, to note precisely what it is that section VIII(C) mandates. That provision places a direct burden upon those who request a removal of a line of business restrictions, for it mandates that any such petitioner *must make a showing*[25] that there is *no substantial possibility* that it *could* use its monopoly power to *impede* competition in the market it seeks to enter. As the underlined language indicates, a Regional Company will not be relieved of a restriction if it makes no showing at all,[26] or if it merely

23. *See United States v. Western Electric Co.*, 592 F.Supp. 846, 860 n. 51 (D.D.C.1984); oral argument of James P. Denvir on behalf of the Department of Justice ("In a very real sense, the restrictions are simply the opposite side of the divestiture coin, they are an integral part of the divestiture and proceed on precisely the same theory that divestiture proceeds on") (Tr. 25179).

24. Varying views have been expressed by the parties and intervenors concerning the meaning of section VIII(C). To the extent that the language of that provision requires explanation through its history and purposes as well as the circumstances surrounding its inclusion in the decree, the Court is in a more advantageous position to provide such explanations than is usually true in consent decree situations, for several reasons.

First, unlike in the typical consent decree case, this decree was filed after almost all the substantive evidence of alleged antitrust violations had been presented to the Court, rather than in lieu of the taking of evidence. *Compare* 15 U.S.C. § 16(b)(2). Second, unlike in the typical consent decree case, the Court conducted an extensive Tunney Act proceeding in the course of which it heard both on principle and on language from many sources, including the Department of Justice, AT & T, and the chief executives of several of the soon-to-be-established Regional Companies. Third, unlike in the typical consent decree case, where the Court simply ratifies language agreed upon by the parties, the Court here was the author of section VIII(C), the very provision at issue in the present proceeding. Fourth, the Court provided in 1982 an extensive contemporaneous explanation of the decree (*AT & T, supra*, 552 F.Supp. at 131), which no one has questioned as an authoritative interpretation.

25. Anyone attempting to overturn one of the restrictions properly bears a particularly heavy burden because of the strong interest of litigants and the public in the finality of judgments. Many enterprises appear to have made crucial business decisions and invested millions and even billions of dollars in reliance on the ground rules established *inter alia* by the line of business restrictions. *See* Response of United Telecommunications, Inc., at 10, which claims to have invested nearly $2 billion "in reliance on the commitment that the BOCs would not be allowed into the interexchange market so long as they could impede competition." This kind of not unreasonable reliance in light of the language of the decree is a factor supporting the proposition that the restrictions should not be lightly overturned.

26. Thus, the Regional Companies are in error when they approach the issue—as several of them do, *see* pp. 534–35, *infra*—as if if the Court had the obligation to engage in a fresh balancing of considerations in the same manner as would be done in a new antitrust action, or even further from the truth, as if the particular restriction had to be affirmatively justified in this proceeding. The restrictions have already

in interpreting it, and in passing upon motions and other requests from the parties. Further, as there stated, notwithstanding the contrary views of the Regional Companies and the Department of Justice,[319] the Court has no doubt of its authority to continue to do so, where there is no inconsistency with the antitrust laws or the factors underlying the approval of the decree as expressed in the Opinion which effected such approval.

Accordingly, the Court will, in the present context, once again take into account values in addition to those stemming exclusively from an environment free of anticompetitive activity, in this case the benefits to the American public from expanded, intelligent, widely available information services transmitted through an infrastructure operated by the Regional Companies. The divestiture of the Bell System, and the decree which brought it about, were not mere exercises in abstract reasoning: they had as their fundamental purpose the promotion of competition in the telecommunications market, to the end that the American public, including the American consumer, might benefit from today's and tomorrow's telecommunications technology in this information age.

The wide dissemination of information services is a key ingredient in that design. As indicated, the French information services scheme permits individual citizens to secure an enormous number and variety of information services with ease and at reasonable cost. While the two nations are not comparable in many other ways, they are surely not dissimilar in regarding as a positive value the access of the citizenry to a variety of sources of information. To the extent that this objective can be promoted through a relaxation of the information services restriction in the decree along the lines outlined above, the Court is prepared to do so.

For the reasons stated, the Court will exempt from the information services restriction the transmission of information generated by others in the manner and to the extent described above. However, in light of the not fully complete descriptions in the record of the various ingredients that are necessary to an information transmission system, juxtaposed against the need for precision (*see* pp. 596–97, *supra*), the parties and interested intervenors are invited to submit proposed orders, accompanied by memoranda, consistent with this Opinion, detailing the necessary ingredients with greater particularity.

IX

Non-Telecommunications Services

[17] Section II(D)(3) prohibits the Regional Companies from "provid[ing] any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff." *AT & T*, 552 F.Supp. at 228. This catch-all restriction prohibits the companies from participating in "unrelated businesses" in which they might have the ability to obtain improper competitive advantages by leveraging their control over the local monopolies. *Id.* at 195 n. 267.

Unlike the core restrictions, the section II(D)(3) prohibition was not imposed on the basis of any specific evidence of anticompetitive activity in non-telecommunications markets by AT & T or its subsidiaries, nor could it have been: by virtue of the 1956 consent decree, the Bell System was not engaged in non-telecommunications business enterprises. Section II(D)(3) rested instead on the proposition that, when an entity with a significant telecommunications monopoly enters some other, competitive business, there is both an incentive and an ability to act anticompetitively. The restriction also reflected the notion that, by limiting the Regional Companies to traditional local exchange services, the goal of the provision of efficient, economical telephone service would be furthered. *Western Electric Co.*, 592 F.Supp. at 855–58.

319. The Department has, however, acknowledged the legitimacy of a cost-benefit test. *See* p. 587, *supra*.

to cross-subsidization between the Bell System's regulated and its unregulated activities that "[o]ver the last fifteen years, the Federal Communications Commission has both recognized and attempted to come to grips with this problem ... but its experience has not been a satisfactory one and it has not been able to establish standards and implement them" (Tr. 9347–48). Professor Melody further stated, in response to questions by counsel for the Department of Justice as to whether regulation could be made effective so as to prevent the anticompetitive practices he had described, that it was "very clear on the basis of ... the entire history of the FCC's attempt to deal with the problem, that there is no way to come to grips with the problem operationally, that AT & T's monopoly power, which extends far beyond the scope of the FCC in terms of its regulation, creates a situation where there is just simply no hope that this could ever be effectively done [by regulation]" (Tr. 9512–13).[13]

Similarly, Dr. Nina Cornell, another government witness, testified that she had analyzed the effectiveness of regulation for achieving effective competition in the telecommunications industry from an economic perspective, and she had concluded that "I don't think regulation can achieve effective competition in the industry" (Tr. 10641). In her opinion, regulation is particularly weak in an area such as telecommunications where the pace of technological change is very fast (Tr. 10658–59).[14]

Significantly, even the two officials who, as heads of the FCC's Common Carrier Bureau for the fifteen years between 1963 and 1978, had been in charge of the regulation of the Bell System during that period, agreed with these assessments. Thus, Walter Hinchman, who was chief of the Common Carrier Bureau from 1974 to 1978, said that "I didn't feel that ... we were at all effective in ... controlling competitive practices or creating an environment for really full and fair competition" (Tr. 10469–70), and that, for a variety of reasons, there was a special regulatory void with respect to the Operating Companies (Tr. 10475).[15] Bernard Strassburg, chief of the Bureau from 1963 to 1973, concurred, testifying that the Commission had a limited budget; that it had to rely to a large extent upon the Bell System to supply it with technical information; and that its expertise to go behind the Bell System's representations was also extremely limited (Tr. 17312).

Based upon this and other evidence, the Court concluded following the close of the Department's case, and in accordance with the arguments presented by the Department,[16] that "the Commission is not and never has been capable of effective enforcement of the laws governing AT & T's behavior," and that accordingly AT & T had been able to violate the antitrust laws in a number of ways over a long period of time with respect to interexchange services[17] and the procurement of equipment. *AT & T*, 552 F.Supp. at 168, 170, and nn.

13. According to the witness, the FCC "has undertaken a massive investigation ... and it has attempted to establish and implement standards that would enable it to judge and to regulate on this basis [but] after about twenty years of trying the FCC has now for all intents and purposes, in my judgment, given up on the task" (Tr. 9353). Professor Melody explained in some detail why the relatively small FCC staff was unable to penetrate to the end and in the necessary depth the voluminous and complex Bell System studies, supporting programs, computer programs, and raw data.

14. Other witnesses, and voluminous documentary material, supported these conclusions.

15. In the witness' opinion, telecommunications regulation is inherently ineffective because "many different services, or ... variations on a type of service ... can be satisfied by the same facilities which ... leads to a very high degree of what are termed common costs of operation, and one of the major problems in regulation is determining how to properly distribute and attribute those common costs to various services" (Tr. 10489).

16. Department of Justice Memorandum dated August 16, 1981, at 46–47, 125 n. *, 161–62, 281–82, 285, and 374.

17. For technical reasons, what is popularly known as long distance service is referred to in the decree and will be referred to herein as interexchange service. Interexchange service does not include long distance calling that takes place within a LATA. For an explanation of that term, *see* pp. 540–41, *infra*.

respect to entry into non-telecommunications markets.

It seems fairly clear that the restriction itself may safely be removed pursuant to section VIII(C) of the decree. Almost all of the parties and intervenors that have addressed the section II(D)(3) issue have concluded that there is no substantial risk that Regional Company participation in non-telecommunications business would permit leveraging of exchange monopolies.[323] That conclusion is also supported by the experience that, following review by the Department of Justice and the Court, every one of the waivers requested in this field was granted.

More problematical is the cross-subsidization issue that the Court sought to address in part by the conditions it attached to the waivers. There is no question but that the removal of the restriction on entry of the Regional Companies into non-telecommunications markets does raise the concern that their operations in these markets will be subsidized by revenues extracted from the rates that are being paid ostensibly for local telephone service. Indeed, as discussed in Part VII, particularly pp. 581–83, *supra*, notwithstanding various restrictions and conditions, such diversions appear to be taking place even now.

As against this continuing problem must be weighed that (1) there is little demand from potential competitors for retention of the restriction; and (2) the relative paucity of joint and common costs between exchange operations and non-telecommunications ventures renders it more difficult to cross-subsidize on a continuing basis in large amounts in this area than in telecommunications-related markets.

In the opinion of the Court, while the issue is by no means open and shut, the balance of factors favors the removal not only of the restriction itself but also of the conditions heretofore attached to restriction waivers. That balance is achieved in part by several public policy or cost-benefit factors (Part VII–B): (1) the waiver process with respect to this non-telecommunications field places a substantial burden on Regional Company planning and decision-making; and (2) this process involves the Court on a fairly significant scale in Regional Company business decisions when the final outcome, at least thus far, has always been the issuance of a waiver; and (3) if the restriction itself has become obsolete, the retention of conditions becomes somewhat unrealistic.

Absent weightier competitive considerations than are present here and now,[324] it is appropriate, therefore, that these companies be freed of detailed judicial oversight of their decisions. There is, of course, independent philosophical utility in a departure of a judicial body from the adjudication of matters that are not likely to present substantial problems in terms of compliance with the antitrust laws.[325]

For these reasons, the Court will remove the restriction embodied in section II(D)(3) of the decree on the entry of the Regional Companies into non-telecommunications ventures. Consistently with that decision, the four conditions heretofore imposed as part of past waivers of the section II(D)(3) restriction will also be dissolved.

323. *See, e.g.*, National Association of Regulatory Utility Commissioners, *Summary Report on the Regional Holding Company Investigations* at 5 (Sept. 18, 1986); *see also Western Electric Co.*, 592 F.Supp. at 853.

324. There is, to be sure, also the somewhat more amorphous risk that the Regional Companies, in their zeal to diversify, will neglect the relatively pedestrian, regulated telephone operations, and concentrate their resources and managerial skills instead upon more glamorous, albeit more speculative, business opportunities. At least one of the usual waiver conditions was designed to deal with this issue. However, it is at least conceivable that the FCC, possibly with a mandate from the Congress, will see its way clear to address this problem should it assume substantial significance.

325. Some have suggested, *e.g.*, Computer and Business Equipment Manufacturers Association at 28, that termination by this Court of the waiver process could result in the filing of a great number of separate antitrust suits throughout the land. For the reasons stated, the Court does not believe it likely that many meritorious antitrust actions will develop.

The Court invited interested persons and organizations to intervene in this proceeding and to file responses to the report and the motions, and the parties as well as the intervenors were given the right to file additional memoranda and replies.[4] A total of some 170 organizations and individuals availed themselves of the opportunity to intervene. In addition to submissions from AT & T, the Department of Justice, and the seven Regional Holding Companies (hereinafter referred to as the Regional Companies),[5] lengthy and thoughtful memoranda were also filed by competitors or potential competitors of the Regional Companies, representatives of state governments and state and public regulatory bodies, consumer organizations, labor unions, trade associations, and others.

The Court received a total of about three hundred briefs, totalling some 6,000 pages, including oppositions, responses, replies, and factual appendices, and it heard oral argument for three days from attorneys representing the parties, the Regional Companies, and the major groups of intervenors. This Opinion and the accompanying Order dispose of all the current controversies involving the retention or removal of the line of business restrictions.[6] The Opinion is organized as follows.

There are two introductory sections—Part I, Background; and Part II, Standard for Removal of the Restrictions. The following three sections address specifically the core restrictions—Part III, Interexchange Services; Part IV, Manufacturing; and Part V, Information Services. The next two sections provide additional information on the removal issue—Part VI, Regulation; and Part VII, Current Anticompetitive Activities and Public Policies. Two sections deal with what may be regarded as non-core restrictions—Part VIII, Information Transmission; and Part IX, Non-Telecommunications Services. The last section, Part X, is the Conclusion.

I

Background

The present controversy had its genesis shortly after World War II. At that time the government became concerned about apparent violations of the antitrust laws by the Bell System,[7] and in January 1949, an action was brought against that System by the Department of Justice which sought, among other things, the separation of telephone manufacturing from the provision of telephone service. The lawsuit was settled seven years later under circumstances which, in the opinion of the Antitrust Subcommittee of the House Committee on the Judiciary, indicated the presence of political and other corrupt influences. *See* Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess., January 30, 1959 (Committee Print).[8]

refer herein both to the Bell Operating Companies and to the Regional Holding Companies as the Regional Companies. *See also* note 5, *infra*.

4. *See United States v. American Cyanamid Co.*, 719 F.2d 558, 564 n. 6 (2d Cir.1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984).

5. The parties and others have also referred to these firms as RHCs, Bell Companies, or Operating Companies. In conformity with the Court's policy to avoid, to the extent possible, initials and expressions not comprehensible to the uninitiated, it will refer to the firms as the Regional Companies, to the local operating firms as the Operating Companies rather than the BOCs, and to the judgment in this case as the decree rather than the MFJ.

6. On December 9, 1986, AT & T filed a motion requesting that the responsibility for screening requests for individual waivers of the line of business restrictions prior to Court action thereon be transferred from the Department of Justice to the Federal Communications Commission. That motion has since been withdrawn, and it will therefore not be decided or discussed herein.

7. Prior to the 1984 divestiture, the terms "Bell System" and "AT & T" were in the main used interchangeably. To avoid confusion with the present truncated AT & T, the Court will herein generally refer to the predivestiture company as the Bell System.

8. For a description of some of the circumstances surrounding the Department's about face that led to the 1956 settlement, *see AT & T*, 552 F.Supp. at 135–38. The Department of Justice's change of position resulting in that settlement was partially responsible for the enactment of

telephone instruments is down dramatically.[329] More importantly, competition has brought about innovations in telephone features on a scale and variety unknown before divestiture.[330] While complaints about that divestiture and the ensuing inconveniences have by no means ceased, an understanding is beginning to emerge that these temporary dislocations are a necessary price for what the newly competitive marketplace can achieve.

It is the attempted destruction of that careful design that the motions now before the Court are all about. Almost before the ink was dry on the decree, the Regional Companies began to seek the removal of its restrictions. These efforts have had some success, in that they have tended to cause the public to forget that these companies, when still part of the Bell System, participated widely in anticompetitive activities, and that, were they to be freed of the restrictions, they could be expected to resume anticompetitive practices in short order, to the detriment of both competitors and consumers. Regional Company claims of wishing only to participate with others in long distance and other restricted businesses on a level playing field obscure the fact that there is no level playing field when one of the participants holds an unassailable franchise on the goal lines that no one else may touch without its permission.

By direction of the decree itself, the restrictions placed on the Regional Companies may be removed only if these companies demonstrate that "there is no substantial possibility that they could use their monopoly powers to impede competition in the markets they seek to enter." The decree rests on the premise that the incentive and the ability to act anticompetitively existed in 1984 when that decree was entered, and the question before the Court therefore is only whether events in the three years since then have changed that situation.[331] Essentially three types of changes are claimed to have occurred.

First, it is argued that the local monopoly bottlenecks have been either wiped out or substantially eroded. However, by the finding of the Department of Justice's own expert, these bottlenecks are still so pervasive that only one in one million telephone users is able to bypass them to communicate with his ultimate customers on his own; the remaining 999,999 users remain

in the monopolistic control of the Regional Companies which, as noted at pp. 581–82, *supra*, were able initially to raise these rates. However, as a consequence of greater public and regulatory awareness and resistance, local rates rose only slightly during the current year, while long distance rates continued their substantial decline. Indeed, state regulatory commissions turned local rate increase requests in the first half of 1987 into rate reductions totalling $92.6 million. *Communications Week*, August 24, 1987, at 30.

329. When the Bell System monopoly had full control, it refused to sell its telephones to consumers, or to permit anyone else to sell them, preferring to charge rentals in the neighborhood of $5–7 per month or more, for a total in, say thirty years, of over $2,000. Today, telephone instruments can be purchased in retail stores everywhere for $25–30 and up. Even if new instruments were purchased from time to time, the total cost would still be far below the unending rental fees.

330. There are now on the market at reasonable prices such by now commonplace features as residential telephones that are able to memorize dozens or hundreds of different phone numbers; telephones that repeat the last number called until it is no longer busy; cellular phones for business and emergency use; cordless phones; instruments that can be instructed by voice (*e.g.*, in an automobile) to call a certain individual, office, or number; and many others.

Parallel with the development of equipment that provides greater accessibility to the telphone user, devices are being produced and marketed that, in a sense, operate in the opposite direction: some of them display the caller's number before the receiver has been lifted; others provide a distinctive ring when a call is received from a number previously designated as worthy of priority consideration; still others automatically block calls from persons with whom the phone's owner does not wish to speak. For the first time since the invention of the telephone, these devices are returning control to the instrument's owner from every salesman, unwelcome relative, or even crackpot who may decide to call at any hour of the day or night.

It is surely not a coincidence that these features, and many more, have become available since the Bell monopoly was ended by divestiture and competition began to reign in the telecommunications marketplace.

331. *See* Part II, *supra*.

9. Monopolies ⇐24(15)

Record in proceeding on motions to remove line of business restrictions on regional telephone companies, contained in antitrust consent decree, did not warrant removing restriction prohibiting regional telephone companies from manufacturing or providing telecommunications products or manufacturing consumer premises equipment.

10. Monopolies ⇐12(1.3)

Under antitrust law, serious competitive concerns are raised even when relatively small market shares, for example as low as seven or eight percent, would be foreclosed as a result of leveraging of regulated monopolies into a related but unregulated market.

11. Monopolies ⇐24(15)

Record, in proceeding on motions to remove line of business restrictions imposed on regional telephone companies under antitrust consent decree, did not warrant removing prohibition on the companies' providing "information services," despite contention, inter alia, that government regulations would suffice to curb discrimination against putative competitors, but so much of the restriction would be lifted as would enable the regional companies to acquire and operate the infrastructure necessary for transmission of "videotex" information services generated by others, without authority to market content-based information services, and in connection therewith, companies could offer "White Pages" but not "Yellow Pages" directory services in electronic form. Communications Act of 1934, § 204(a), 47 U.S.C.A. § 204(a).

12. Monopolies ⇐24(15)

In enforcement of antitrust laws through maintaining line of business restrictions on regional telephone companies pursuant to consent decree, consumer protection, including protection against unreasonably high rates, was an appropriate concern and not contradictory of antitrust principles. Clayton Act, § 5(b)(2), 15 U.S.C.A. § 16(b)(2).

13. Monopolies ⇐24(15)

Congressionally declared goal of universal telephone service could be legitimately taken into consideration in determining whether to maintain line of business restrictions on regional telephone companies pursuant to antitrust consent decree. Communications Act of 1934, § 1, 47 U.S.C.A. § 151.

14. Monopolies ⇐24(15)

Consideration of policies embodied in the First Amendment in promoting diversity of sources of information was appropriate in antitrust action in determining whether to maintain line of business restrictions in consent decree, preventing provision of information services by regional telephone companies. U.S.C.A. Const. Amend. 1.

15. Constitutional Law ⇐90.1(9)

Consent decree entered into in antitrust case, prohibiting regional telephone companies from engaging in information services business, did not constitute an infringement of the companies' First Amendment rights. U.S.C.A. Const.Amend. 1.

16. Monopolies ⇐24(15)

Court in antitrust suit could properly consider the probable deleterious effect on American foreign trade of removing line of business restrictions on regional telephone companies.

17. Monopolies ⇐24(15)

Removal from antitrust consent decree of restriction on regional telephone companies participating in "unrelated businesses" was warranted.

Charles F. Rule, Acting Asst. Atty. Gen., Barry Grossman, Chief, Communications and Finance Section, Nancy C. Garrison, Asst. Chief, Communications and Finance Section, Edward T. Hand, Asst. Chief, Foreign Commerce Section, Ben Giliberti, Atty., Antitrust Div., U.S. Dept. of Justice, Washington, D.C., for U.S. Dept. of Justice.

John D. Zeglis, Jim G. Kilpatric, Francine J. Berry, Basking Ridge, N.J., Howard J. Trienens, David W. Carpenter, Chicago, Ill.,

the beneficial effect of permitting the Regional Companies hereafter to make decisions with respect to substantial segments of their business without day-to-day involvement or supervision by the Court.[336]

Second. One of the core restrictions of the decree prohibits the Regional Companies from providing information services. The Court is retaining that restriction insofar as it involves the generation of information content, for the same reason that it is retaining the other core restrictions. If the Regional Companies had the authority to sell information in competition with other providers of these services, their control of the networks essential to the distribution of that information would give them the same ability to discriminate against competitors as they have with regard to interexchange services and the manufacture of telecommunications equipment.[337]

That does not mean, however, that the public must be deprived of the revolutionary changes that are possible if information, instead of being transmitted only by current methods,[338] can also be made available to vast numbers of consumers instantaneously by means of the telephone network. Other nations—France in particular, but also Japan and Great Britain—have experimented with such an innovative use of the telephone system, with some considerable success. The French Teletel system —which may for present purposes serve as a rough guide in this regard—has some three million subscribers and is used to supply to these subscribers immediate access to about 4,000 independent services supplying specific information upon request in such fields as banking and brokerage, shopping (availability and price), travel (schedules and reservations), tickets to entertainment and sporting events, employment availability, language instruction, governmental notices, schedule of meetings of associations, reprints of newspaper and magazine articles, and others.

The Court has concluded that the apparently competing interests—prevention of monopolization of information services versus broad availability of such services to the public—can be reconciled by severing for decree purposes the generation of information content (which will remain prohibited to the Regional Companies) from the transmission of information services (which the Regional Companies will be allowed to provide).[339]

The Court will accordingly lift so much of the information services restriction as prevents the Regional Companies from constructing and operating a sophisticated network infrastructure[340] that will make possible the transmission, on a massive scale, of information services originated by others, directly to the ultimate consumers.[341] No one can know with certainty whether this revolutionary means of transmitting useful, readily-available information will find acceptance in this country to the same extent as it has elsewhere. But the Court believes that it should do what it legitimately can to foster the availability of such a service.

The decisions made herein continue to advance the objectives of the decree as the Court understood them when it approved that decree in 1982, and in its rulings since then: (1) the establishment in the telecommunications industry of conditions of fair competition, freed from of the heavy hand of monopoly; (2) the protection of the goals of universal service and of reasonable rates for those who could not otherwise afford telephone service; and (3) the encouragement of innovation, to the end that the full

336. Part IX, *supra*.

337. Part V, *supra*.

338. *E.g.*, by contacting a public library, through the mails, or by advance subscription to one of the existing information services.

339. *See* Part VII, *supra*.

340. Part VIII, *supra*.

341. In order to receive this information in usable form, these consumers will not require, as now, a complex PBX to unscramble and receive it, or even a full-fledged computer terminal; they will only need to have what is called a "dumb terminal"—a relatively inexpensive instrument that could be sold both by the Regional Companies and by more conventional retailers.

Corp., 656 F.2d 120 (5th Cir.1981). Defendant claims plaintiff cannot satisfy the latter two requirements because the undisputed evidence before the MSPB revealed that he was not qualified for any of the seven positions open in OPR, and because it is undisputed that, of the four individuals that plaintiff claims were preferentially transferred out of EPD prior to the RIF, two were over 40 and two were under 40, thus demonstrating the absence of age discrimination.

[6] Defendant's contentions are flawed, however, in at least two respects. First, whatever the undisputed evidence before the MSPB, that evidence has not been put before this court. Rather, defense counsel has simply attached the opinions of the MSPB to the motion for summary judgment, as well as his own unsworn declaration, pursuant to 28 U.S.C. § 1746, that the recitation and account of testimony given by witnesses before the MSPB set out in defendant's motion and reply brief is, to the best of counsel's knowledge, accurate and correct. This court's review of plaintiff's claim before the MSPB, however, is *de novo*. *Nabors v. United States*, 568 F.2d 657 (9th Cir.1978). While the court may consider the administrative record when relevant, a grant of summary judgment based on the factual findings of the MSPB presiding official and the factual representations of defense counsel would effectively deny plaintiff his right to a *de novo* hearing. Second and more importantly, the essence of plaintiff's ADEA claim is not that the RIF was carried out in a discriminatory fashion, but that the events prior to the RIF were improper. For this reason plaintiff's claim cannot be neatly analyzed according to the framework set out in *Williams v. General Motors Corp.*; whether or not plaintiff was qualified for any of the seven vacancies in OPR after the RIF is essentially immaterial to his claim that Warren Bullock transferred him to EPD with the knowledge that that division's days were numbered, and with the intent and purpose of getting rid of him. It is true that plaintiff has offered little evidence other than his own belief in support of this claim, but defendant's representations concerning undisputed testimony before the MSPB do not negate that claim, or so impugn it that this court must enter summary judgment in favor of defendant.[4]

Accordingly, for all the foregoing reasons, it is this 1st day of July, 1987

ORDERED that defendant's motion to dismiss count I of the complaint be and it hereby is denied; and it is

FURTHER ORDERED that defendant's motion for summary judgment as to count II of the complaint be and it hereby is granted.

4. Defendant's representations would, if accepted, negate plaintiff's claims concerning the preferential pre-RIF transfer of certain employees out of EPD. His allegations concerning his own transfer *to* EPD would nevertheless continue to remain viable, however. Because the court must go to trial on this latter claim, and because plaintiff is entitled to *de novo* review on his ADEA claims in general, the court declines to grant defendant summary judgment on the propriety of the transfer of certain EPD employees just prior to the RIF.

UNITED STATES of America, Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., et al., Defendants.

Civ. A. No. 82-0192.

United States District Court, District of Columbia.

Sept. 10, 1987.

Motions were filed seeking removal from antitrust consent decree of line of business restrictions imposed on regional telephone companies. The District Court, Harold H. Greene, J., held that: (1) under the decree, restrictions could be removed only on affirmative showing that regional